

**Maidsville Coal Co., Inc. and United Mine Workers of America, District 31. Cases 6-CA-12289 and 6-CA-12533**

September 1, 1981

**DECISION AND ORDER**

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On March 16, 1981, Administrative Law Judge Robert G. Romano issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, find-

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge that a fair election has been precluded by Respondent's unfair labor practices, and that a bargaining order is the appropriate remedy. In this regard, we note that the Employer engaged in repeated violations of Sec. 8(a)(1) and (3) of the Act and that these violations were of such a pervasive and extensive nature that our ordinary and usual remedies would not erase them sufficiently so as reasonably to insure the future holding of a fair election. In particular, the evidence establishes that, at the outset of its employees' union organizational activities, the Employer commenced a campaign designed to undermine and erode the Union's majority support among its employees by discharging four identified union supporters on the sole basis of these employees' union sentiments. At the same time, the Employer violated the Act by interrogating employees concerning their union activities and sentiments; by granting wage increases; by making various promises of improved working conditions and benefits in order to dissuade employees from supporting the Union; and by threatening employees with discharge, layoff, and other reprisals, including the cessation or reduction of operations, if they continued to engage in activities on behalf of the Union. Thereafter, the Employer enlisted the aid of a third party to threaten an employee with physical harm if he continued to support the Union.

ings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.<sup>2</sup>

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Maidsville Coal Co., Inc., Maidsville, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order,<sup>3</sup> except

Under these circumstances, including the small size of the employee complement in question and the substantial percentage of the work force subjected to the Employer's unlawful terminations and other unfair labor practices, we find that a bargaining order is necessary and appropriate in order to protect the majority sentiment expressed through the authorization cards and to otherwise remedy the violations committed. However, as the Union did not request recognition until April 19, 1979, and Respondent's other unfair labor practices are remedied by the Order herein, we find, contrary to the Administrative Law Judge, that Respondent's bargaining obligation arose as of April 19, 1979. See *Cas Walker's Cash Stores Inc.*, 249 NLRB 316 (1980), and cases cited therein at fn. 3.

Member Jenkins would, as he stated in *IDAK Convalescent Center of Fall River, Inc. d/b/a Crawford House*, 238 NLRB 410 (1978), date the bargaining obligation from either the date of the Union's demand for recognition or from the commencement of the unfair labor practices, whichever is necessary to remedy all the unfair labor practices.

The Administrative Law Judge correctly found that Respondent violated Sec. 8(a)(1) in granting an unscheduled wage increase to, *inter alia*, employee James Fain. However, we disavow the Administrative Law Judge's characterization of Respondent's motivation for the size of the increase as having been "in part" for antiunion reasons. We find the 8(a)(1) violation because the Administrative Law Judge correctly determined that the overall effect of the wage increase was to "interfere with, restrain, or coerce" Fain in the exercise of his Sec. 7 rights.

<sup>2</sup> Nothing contained in our Order will require or authorize Respondent to withdraw or discontinue any wage increases previously granted.

<sup>3</sup> In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

that the attached notice is substituted for that of the Administrative Law Judge.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT unlawfully interrogate our employees because of their union activities, sympathies, and desires and the union activities, sympathies, and desires of their co-employees.

WE WILL NOT unlawfully grant our employees wage increases in order to dissuade them from supporting the United Mine Workers of America, or its District 31; and WE WILL NOT promise our employees increased hourly wages, improved working conditions, and other benefits in order to dissuade them from selecting the Union as their collective-bargaining representative and/or from engaging in activities on behalf of the Union.

WE WILL NOT threaten our employees with discharge, layoff, and cessation or reduction of operations if they select the Union as their representative, and with nonrecall because of union activities; and WE WILL NOT utilize a third party to threaten employees with reprisal or physical harm if they continue to engage in activities on behalf of the Union.

WE WILL NOT discriminatorily discharge, or cause the termination of and/or constructively discharge, our employees.

WE WILL NOT refuse to recognize the United Mine Workers of America, as the designated exclusive collective-bargaining representative of an appropriate unit of employees at our Maidsville, West Virginia, facility. The appropriate bargaining unit is:

All production and maintenance employees employed at our Maidsville, West Virginia, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the above-described appropriate unit with respect to rates of pay, hours of employment, and

other terms and conditions of employment of the employees included within the appropriate bargaining unit.

WE WILL offer Richard G. Heller immediate reinstatement to his former job of weighmaster, or, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges; and WE WILL make whole employees Earl F. Bowman, William Kent Eddy, Charles L. Trippitt, and Richard G. Heller for any loss of earnings, plus interest, they may have suffered by reason of the unlawful discrimination against them.

## MAIDSVILLE COAL CO., INC.

### DECISION

#### STATEMENT OF THE CASE

ROBERT G. ROMANO, Administrative Law Judge: These consolidated cases were heard in Morgantown, West Virginia, on December 3-7, 1979.<sup>1</sup> The original charge in Case 6-CA-12289 was filed on April 20 (amended on April 27) by United Mine Workers of America, District 31 (herein the Charging Party or the Union), against Maidsville Coal Co., Inc. (herein Respondent); and the original complaint thereon was issued on June 13. The original charge in Case 6-CA-12533 was filed on July 6 by the Union against Respondent; and the complaint thereon was issued on August 21. Thereafter, the above cases were ordered consolidated for hearing.

The consolidated complaints allege that Respondent on various dates in April and May unlawfully interrogated and created the impression of having unlawfully interrogated employees as to their union activities, sympathies, and desires; variously threatened employees with discriminatory discharge, layoff, cessation of operations, nonrecall of employees, and reprisals of physical harm; discriminatorily promised and granted wage increases; and promised improved working conditions and other benefits in violation of Section 8(a)(1) of the the National Labor Relations Act, as amended. The complaints further allege that on April 13 Respondent discriminatorily discharged employees Earl F. Bowman, Charles L. Trippitt, Richard G. Heller, and Willard Kent Eddy, thereafter refusing to reinstate them until April 23, and that it subsequently caused the termination of (constructively discharged) Richard G. Heller on May 21, all in violation of Section 8(a)(3) and (1) of the Act. Finally, the complaints allege that Respondent has refused to bargain with the Union as the designated representative of its production and maintenance employees as of April 19 in violation of Section 8(a)(5) and (1) of the Act, though it is also alleged that the Union had obtained its majority designation earlier on April 10, and a remedial bargaining order is sought as of that date in view of certain ear-

<sup>1</sup> All dates are in 1979 unless otherwise indicated.

lier conduct by Respondent. On June 19 and August 23, Respondent filed answers to the respective complaints denying the commission of any unfair labor practices.

Upon the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after due consideration of the extensive briefs filed by the General Counsel on February 11 (dated February 6), by Respondent on February 7, and by the Charging Party on January 31, 1980, I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

Respondent is a West Virginia corporation with its sole place of business in Maudsville, West Virginia, where it is engaged in the preparation and nonretail sale of coal. Respondent annually ships goods and materials valued in excess of \$50,000 to firms or enterprises located within the State of West Virginia which are themselves directly engaged in interstate commerce. The complaints allege, Respondent by its answers admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. At the hearing Respondent also admitted, and I find, that United Mine Workers of America, and United Mine Workers of America, District 31, are labor organizations within the meaning of Section 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

#### 1. Respondent's operation and the stipulated management hierarchy

Respondent has been engaged in the nonretail sale of specialized coal to industrial users for approximately 9 years at its Maudsville, West Virginia, tippie facility. John Petite is president of Respondent and has occupied such position since Respondent's formation in October 1970. Jasper Petite is vice president of Respondent. Charles Guseman, brother-in-law of John Petite, has been employed by Respondent since 1970, and, during all material times herein (I find), was employed as superintendent. On the basis of the parties' stipulations and/or the evidence of record, I find that John and Jasper Petite and Superintendent Charles Guseman, during all material times herein, were supervisors within the meaning of Section 2(11) of the Act. The parties have further stipulated, and I additionally find, that, during material times herein through and inclusive of April 21, James Casino occupied the position of day-shift foreman, and also was a supervisor within the meaning of Section 2(11) of the Act. As of April 10, Respondent operated just two shifts, a day shift and an afternoon shift. The utilization of an afternoon-shift foreman is in issue. Generally, in the conduct of its above tippie operation, Respondent essentially employed plant, machine, and barge operators and a scaleman or weighmaster.

<sup>2</sup> The General Counsel's unopposed motion to correct the record dated January 30, 1980, is granted, and it is received as G.C. Exh. 18.

#### 2. The appropriate unit; unit composition and majority issues preliminarily defined

##### a. The appropriate unit

The complaints allege, and on this record I find, that all production and maintenance employees employed by Respondent at its Maudsville, West Virginia, facility, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

##### b. Composition and majority issues

It is uncontested that a bargaining demand was first made by the Union upon Respondent on April 19. The General Counsel and the Union additionally contend (and it is denied by Respondent) that the Union had attained collective-bargaining representative status, as evidenced by a valid card majority of the employees in the above-determined appropriate unit, as of April 10. On the basis of allegations of Respondent's simultaneous and extensive commission of unfair labor practices in violation of Section 8(a)(1) and (3), commencing early in April, the General Counsel and the Union have herein requested, *inter alia*, in remedy thereof, a remedial bargaining order as of April 10, in addition to the finding of a violation of Section 8(a)(5) in Respondent's subsequent refusal to bargain with the Union upon demand on and after April 19. At these material times Respondent operated day and afternoon shifts.

In that respect, employed on the day shift and working as of April 10 were Willard Eddy, William Elliot, Dennis Ingersoll, Howard Tennant, and Richard Heller. Further, it is uncontested that James Fain, a recently hospitalized day-shift employee, remained an employee, and that Fain is thus to be included in the unit as of April 10 (indeed as of April 19).<sup>3</sup> Employed on the afternoon shift as of April 10 were Earl Bowman, Kenneth R. Roberson, Charles Trippitt, and Jeffrey Freeman. The record clearly reveals, and I find, that employee Bowman validly designated the Union as his exclusive collective-bargaining representative on April 9, and that afternoon-shift employees Roberson and Trippitt did so on April 10, as did day-shift employees Eddy and Heller. The parties are in major dispute over the inclusion/exclusion of Heller and Freeman.

Heller was originally hired as a scaleman or weighmaster in 1976. Following a layoff in February, Heller was recalled to employment, but as a general yardman, or feeder operator as Heller asserts, in place of injured employee Fain. The General Counsel and the Union would include Heller as a production and maintenance

<sup>3</sup> Though not appearing on the time and attendance payroll records specifically for April 10, other record evidence reveals that Fain had been previously employed in February and March on the day shift (apparently) as a general yardman before being shot (apparently) and hospitalized over a weekend. Such records as were made available reveal that Fain's absence began on March 26 (a Monday) and that he returned to work on April 23. Fain was thus absent for about a month. Fain, who worked until he quit on November 5, did not testify and the record reflects that his whereabouts were not known at the time of the hearing.

employee, and they would exclude Freeman on the basis of the contention that he was the afternoon-shift foreman and a supervisor and/or because of the special status he otherwise is shown to have occupied in relationship to Respondent. (The complaint herein alleges that Freeman was a supervisor and agent of Respondent and that through Freeman's conduct Respondent engaged in certain of the above unfair labor practices.) In contrast, Respondent would include Freeman, contending that he was not a supervisor but a production and maintenance employee; Respondent, in turn, would exclude Heller, contending that he was a supervisor and/or a managerial, confidential, or office clerical employee.

It is readily apparent from the above and the record otherwise<sup>4</sup> that the parties are in essential agreement as to the inclusion of eight employees in the unit, four of whom had signed valid designation cards for the Union by April 10, and four of whom had not. The major issues of contention as raised by the parties over the unit placement of Heller and Freeman are observed to involve issues not only of unit composition, but also of the majority status of the Union itself. It would appear necessary only to additionally note in passing that, although the record reflects that an additional authorization card was signed by one former employee, Andrew Long, on April 11, it also reveals that another former employee, William Randy Phillips, who (uncontestedly) occupied the same employment status as did Long, did not sign an authorization card. All parties appear to be in agreement that the actual status of Long and Phillips need not be resolved, since as a practical matter all parties would concede that an identical status is occupied by them; and their inclusion or exclusion could thus not affect the majority designation issue herein. In agreement with the parties, I thus find it unnecessary to resolve their status in this proceeding.<sup>5</sup> As Heller and Freeman occupied

their employment status in a relatively small employer operation, and since resolution of their individual status appears to be central to the contentions of all parties, and resultingly was much litigated by all parties, I shall address and evaluate the record evidence of their duties and performances only after an initial review of Respondent's business and operational structure and background.

### B. The Operations

John Petitte testified that when a predecessor coal company moved from Respondent's present locale it had left him mostly junk. There were then four to six piers in the river and an abandoned tippie. Petitte originally worked in Respondent's yard (with two or three other employees), and for about 4 years he operated a highlift (front-endloader) and loaded barges. In 1975-76 Petitte had a preparation plant built, in 1978 he added a scale and built a scalehouse, and in 1979 he refurbished the river tippie, discussed *infra*. Petitte related that he presently spends 2-3 days at Respondent, and is still occasionally active in physical work, though otherwise roughly estimating that he regularly spends about one-third of his time in the office, one-third at the plant and loading operations, and the remaining one-third at his mines, one organized by the Union (Petitte Brothers Mining Company, Inc.) and one unorganized (Electra Fuels, Inc.). (Still another mine, Jasper Coal Company, was shut down in early 1979 for economic reasons.)

Broadly and physically viewed, Respondent's present operation is thus composed of a (truck) scale for weighing incoming coal; an adjacent weighscale house, or building, with several rooms (supply and offices); a tippie preparation plant with plant waste-discharge settling ponds; a yard area with some stockpiling space, two loading facilities, a river tippie (with barge access), and a railroad tippie (with rail access); and various equipment, including two to three front end-loaders (highlifts). The functional operation coal supply is purchased and brought in by independent truckers either from the mines owned and independently operated by the Petittes or from independent mine producers. On arrival the raw coal is first weighed by a scaleman (or weighmaster), who records the tonnage received, and the coal is then dumped for either further coal preparation or raw processing prior to loading and shipment to Respondent's customers by barge or railroad car.

Coal dumped by a feeder near the preparation plant is pushed or carried into a hopper by a front-end loader (feeder) operator from which point the coal travels up a conveyor belt into the preparation plant, which is itself operated by a separate plant operator. At the mouth (apparently an end) of the plant there are three stacker belts. Respondent's plant has the capacity to stack only 350-400 tons. Thus, normally a second front-end loader is kept at this location to move processed coal away. However, it appears that the front-end loader kept at this location to move processed coal away is one which may be operated by anyone of several individuals. There is considerable regular and ongoing maintenance associated with (all) conveyor belts and rollers over which belts are

<sup>4</sup> The parties stipulated that Eric Shreve (a day-shift welder), who appears on certain records, had earlier quit Respondent's employment on March 21 and is not to be included in the unit. New employees Pete Guariglia, William Howdershelt, and John Price apparently were hired on April 18, and did not begin work until April 23. Clearly they were not employed as of April 10. The General Counsel also correctly observes that employees who had been hired but who had not yet begun to work as of the material date of the demand for, and refusal of, recognition and the commencement of bargaining are not to be included in the unit for purposes of determining majority status. Cf. *Western Drug*, 231 NLRB 890 (1977), enforcement denied on other grounds 600 F.2d 1324 (9th Cir. 1979). The parties also clarified by stipulation that employee Nicholas Myers quit Respondent's employment in August 1978, was later rehired, but similarly began work on April 24. Accordingly, all parties appear to be in agreement, and in any event I find, that employees Guariglia, Howdershelt, Price, and Myers are not to be included in the unit for purposes of establishing the Union's claimed majority on either April 10 or 19.

<sup>5</sup> I do note that Jasper Petitte testified that he had instructed Foreman Casino to fire Long and Phillips, and that they had received low earnings slips (for unemployment compensation) through the deceit of the office clerical, Janice Cyzick. However, Cyzick, called by Respondent, testified that Foreman Casino had told her that Long and Phillips were laid off and could receive low earnings slips. Jasper Petitte acknowledged that by the time he became aware of it he simply decided to let it go. As noted herein, Casino was not called on this or any other matters. Employee Eddy related that Long and Phillips missed work on Thanksgiving at the same time that Eddy did. Eddy testified that he was suspended for 3 days after which he was returned to employment, but that Long and Phillips were either fired or laid off and did not work again.

propelled. Both have to be kept greased and/or clear to run freely at all times. The conveyor belt lines thus have to be regularly walked and checked; and from time to time broken belts and rollers have to be repaired. There is also a "Gig" or wash box in the plant where coal is washed. Steel graded hoses have to be kept in repair. Resulting slurry (from coal washing) is itself pumped underground beneath railroad tracks and up a hill to a series of settling ponds where the coal residue is designed to settle with discharged clear water that is eventually made into a creek which runs by the scalehouse into the river. Discharged water must be periodically checked for acceptable clarity.

As noted, Respondent has a loading facility at the river where barges are pulled up and filled with coal by a barge operator/loader. Movement of the barges in the past has been either manually, by power wench, or, on request, with the assistance of a tugboat owned by a nearby and organized company. Respondent has a crusher for coarse coal at its river tippie (and one at its railroad tippie). The crusher from time to time will plug up with fine coal at which time they must be cleaned out. This cleaning operation is itself a two-to three-man operation requiring electrical power disconnects by a knowledgeable employee, and laborious prying, sledge hammer, and shovel work by two to three employees. Often times railroad cars, prior to their being filled at the railroad tippie, have to be first cleaned of pellet, iron, and other debris by shovel or spill, and the waste is then moved away by shovel or front-end loader. The two to three front-end loaders used in Respondent's operation are described as old and requiring considerable maintenance and/or prompt repair as they may be needed in several locations for the operation to continue. Since April 23 Respondent has operated three shifts. Prior to the start of each shift, under existing governmental regulations, Respondent must inspect and certify that its plant and equipment are safe and ready for use. (The recording is made on a separate preshift report.) In passing it is noted that the weighmaster (who works the day shift) will record on the daily report (in addition to recording incoming coal tonnages) any and all barge and railcar shipments, including tonnages shipped, discussed *infra*. As noted, the central issues of litigation in this proceeding have revolved around the status of two individuals, Jeffrey Freeman and Richard Heller.

*C. The Employment History and Duties of Jeffrey L. Freeman and Richard G. Heller Through April 10*

1. Jeffrey L. Freeman

In 1975-76 Petite had Respondent's preparation plant built by Interstate Engineers, a local construction firm. Freeman was hired at that time from one of the latter's working crews by Jasper Petite and Guseman because of Freeman's demonstrated welding skills and mechanical ability. In a word, Petite summarized that Freeman can do everything, and Petite testified, with much record support, that, in addition to a varied use of such welding skills for Respondent, Freeman can operate all the equipment; he is more skilled with the high lift and (general) machinery repair than others; he can operate the plant at

least as well as others, has loaded barges and railcars, is the most experienced employee in electrical matters, and handles the power disconnects; and he does other physical work, essentially doing whatever needs to be done, including shoveling tailpieces as necessary.<sup>6</sup> Freeman confirmed that he had done welding and pipefitting work on the original preparation plant; that he was then hired by Respondent on June 15, 1976; and that he initially worked on the day shift as a plant operator, but also had run a highlift and did anything else required to be done. Following about 6 months of working on the day shift Freeman began working on the afternoon shift where he had continued working through early 1979.

Apart from the contentions made by the General Counsel and the Union that Freeman also served as an afternoon supervisor, it is clear from the evidence of record that there was otherwise no supervisor present throughout the afternoon shift. Nonetheless Petite, with corroboration from Freeman, testified that Freeman had never been granted authority to hire or to fire, to discipline, or to grant wage increases, nor recommend same; that the work on the afternoon shift got done because the work was basically routine; that the afternoon crew was a closely knit experienced work force that knew what had to be done; and (with corroboration from Guseman) that the crew received such instructions as were necessary directly (or indirectly by note) from Guseman, who frequently worked beyond 3 p.m., or from Petite, who was frequently there at shift overlap or returned at night. As otherwise described and summarized by Petite, Freeman was simply a skilled employee and a hard worker, a go-getter with nerve, who kept the plant running on the afternoon shift mainly because of his welding and mechanical skills, and who, because of his personal attributes and characteristics, became a self-appointed leadman and in the eyes of the Employer, a spokesman for them.

Guseman confirmed that he usually worked from 7 a.m. to 3 p.m. (the day shift), but that he would stay after 3 p.m., usually two to three times a week, and that he was on call 24 hours a day. Guseman testified that he was responsible for the operation of the yard, and that he instructed the day shift employees as to what they were to do, including deciding when maintenance work needed to be done and also making employee reassignments upon job completion. Guseman reported directly to both Johnny and Jasper Petite, and he testified that it was Jasper Petite who decided what type of coal was to go in a given barge, and that the latter's instructions thereon were relayed to the employees through Guseman. Guseman confirmed that Petite was there most of the time during daily operations, and testified that Petite was unquestionably known to be the boss. According to Guseman, Respondent had had no prior set policy with regard to the various authorities of hiring, firing, or granting wage increases, though everyone recognized

<sup>6</sup> It appears that tailpieces are actually part of the machinery located at belt line ends and that they regularly create coal spillages. In any event, coal at certain locations would pile up under the belt, and the coal then had to be manually shoveled out from time to time. Such a work assignment is herein referred to as shoveling tailpieces.

that Petite was the individual in charge, and before anything happened it went over Petite's desk. Nonetheless, Guseman also testified that hiring had theretofore been accomplished by the Petittes and himself. (Guseman's variant testimony as to firing and discipline by himself and Freeman is deemed too inconsistent to be dispositive.)

According to Guseman, Casino, though assigned and working (since April 23) as a plant operator on a newly instituted night shift, had formerly worked with him as a foreman on the day shift. Guseman confirmed that when necessary he had left general instructions with Casino (directly or indirectly by note) as to what Guseman wanted done on the day shift, and he (significantly) acknowledged that general instructions were similarly left by him for Freeman as to what work he wanted done by the afternoon crew. While confirming that Freeman had performed various physical work (which none of the employees herein deny), including shoveling tailpieces, Guseman acknowledged that (admitted) Supervisor Casino had similarly done as much on the day shift, and, indeed, that Guseman himself also had shoveled tailpieces, though only when necessary.

Employed on the afternoon shift with Freeman were feeder operator Trippitt, plant operator Roberson, and barge operator Bowman. (Bowman and Trippitt were called as witnesses by the General Counsel and Freeman and Roberson by Respondent.) Trippitt testified that, when he spoke to Guseman about a job and was hired (I find on May 22, 1978), Guseman informed him that Freeman was the afternoon-shift boss. Trippitt also testified that when he reported for work it was Freeman who took his name and social security number, who told him what his pay would be, \$4.50 per hour, and who then showed him what he was to do, telling Trippitt that every man should know what to do on the job. Freeman initially put Trippitt to work in the plant, hosing and shoveling tailpieces, and later directed Trippitt to learn how to run the highlift. The record reveals that Trippitt has received three raises. Trippitt testified that on the first two occasions he had asked Freeman for a raise, that Freeman had said he would check into it, and that a week or so later Freeman had come back to him and said the raise would be on Trippitt's next check—and it was.<sup>7</sup>

Trippitt also testified that, when he wanted to leave early, he informed Freeman, who then told him to go ahead and leave. On other occasions Freeman instructed him to work all night to get the barges loaded, and told Trippitt that if he did not want to work not to bother to come back. On other occasions Freeman told Trippitt to quit work before the regular end of the shift at 11 p.m. (e.g., because a barge was struck or power was out). Trippitt also testified that Freeman has frequently taken him off one job and put him on another, e.g., while running the loader, and that Freeman has told him (and others) to go to the river and pick slate, to gauge barges, or to do maintenance work, grease the belt (rollers), shovel tailpieces, or change filters. Freeman was called

when there were problems at work, e.g., when the crusher became plugged; or for instructions as to the type of coal that was to be put into a barge.<sup>8</sup> Trippitt also testified that he has been sent by Freeman to pick up parts.

Earl Bowman, herein Bowman, testified that on August 7, 1978, he received a call from his father, herein Bowman Sr., who operates a tug (*Donna Lee*) for Consolidated Coal, advising him that Bowman Sr. had heard there was a barge gauger job opening at Respondent. They went there that evening about 5 p.m. At that time Respondent was building its (temporary) scalehouse, and Petite and Freeman were both present. Bowman's version is that his father asked Petite if he was doing any hiring. Petite advised him to talk to Freeman.<sup>9</sup> Bowman recalled that his father then asked Freeman if they were doing any hiring; and Freeman asked Bowman if he knew how to run a front-end loader. Bowman replied in the negative, but added that he was not afraid to learn. Freeman told Bowman to come back the following afternoon with his hardhat, hard toes (shoes), and lunch bucket. Bowman acknowledged that Petite was present while Freeman spoke to him, but Bowman repeatedly could not remember if Freeman had talked to Petite in the interim; i.e., before telling him to report for work the next day. Respondent's version (Petite and Freeman) is essentially that it was at the direction of Petite that Freeman had made the inquiry of the Bowmans as to what they wanted; that Freeman reported back to Petite before Bowman was hired, and that Petite had thus done the actual hiring. In the light of the unsureness on Bowman's part as to whether Freeman had conversed again with Petite before Bowman was told he was hired, I conclude and find that Freeman did so. However, the record also reflects a candid acknowledgement by Petite of an initial unfavorable impression as to the physical suitability of Bowman for the job, and that Petite asked for the opinion of Freeman, who pointed out the favors<sup>10</sup> that the tugboat *Donna Lee* had done for Respondent, along with the observation that they did need some river help at the time. In my view the evidentiary circumstances described above reflect an effective hiring recommendation. However, the issue of Freeman's status need not be left resolved on such limited basis.

On August 8, 1978, Bowman reported for work at 3 p.m. According to Bowman, Freeman first recorded Bowman's name and social security number, and then took Bowman through the yard to the plant. There Freeman introduced Bowman to loader/operator Trippitt, telling Trippitt that he was to show Bowman what to

<sup>8</sup> On the other hand, Trippitt candidly acknowledged that in the spring of 1979, while Freeman was welding in remodeling the tippie at the river (some 100 yards from the plant), the employees could and did run the plant without Freeman just as well as if he were there. However, the record reveals that Freeman was on call even then for breakdowns. Trippitt also testified that more recently Superintendent Guseman and Freeman were rotating on the day and afternoon shifts every 2 weeks.

<sup>9</sup> On one occasion Bowman said that Petite initially replied "Yes," and on another that he did not know, to ask Freeman.

<sup>10</sup> Consolidated Coal has river tippie facilities about 300 yards from Respondent. On several occasions barges arriving at Respondent's tippie for loading had become hung up because of river dredging. Upon request, they were brought in by the tug *Donna Lee*.

<sup>7</sup> The first raise received after 3-4 months was for 50 cents, and the second was for 75 cents. The special circumstances under which Trippitt received the third raise are discussed *infra*.

do, and advising Trippitt that Bowman would be in there for a couple of weeks on a trial basis. During that period Bowman shoveled tailpieces under belt lines, and hosed down coal dust in the plant basement. Bowman was thereafter put on loading barges on the afternoon shift, which at the time of hearing he had been doing for over a year, and proficiently so. Bowman testified that he regarded Freeman as his boss and a foreman. More significantly, he testified credibly that one day in October (1978) Freeman came to the barge and (without an earlier request by Bowman) told Bowman that he was due and deserved a raise, that Freeman would tell Guseman to tell Petite that, and that 2-3 hours later Freeman came back and told Bowman that he had a \$1 raise in pay effective immediately. (Petite confirmed that his initial impression was incorrect and that Bowman has proven to be an excellent worker.) Bowman testified that occasionally Freeman had told the afternoon employees that they could quit early (when there was no coal to clear and all agreed to go home), that on other occasions Freeman has told them they were to do other jobs (e.g., perform maintenance, grease belts, shovel tailpieces, or hose down the plant), that, when the barge was stuck, Freeman had told Bowman to tie it up and to go up to the plant and clean there and that in March-April Freeman had also told him to work overtime; and Bowman corroborated Trippitt that Freeman had told the employees that, if they did not work overtime, they might just as well not come back to work because they would be fired. Bowman also testified that Freeman has taken him off one job and put him on another; e.g., if he was working on railroad cars and a barge came in, Freeman would send him down to the barge, saying that Freeman would finish up on the railroad cars. Freeman has also told Bowman to get a front-end loader and clean up the nut coal (stock), or directed him to pick up supplies. Bowman related that, on another occasion in March or April at a time when there were three barges in, Freeman had also told the employees that they had let him down because he had told Petite that they would load all three barges, but they had only loaded one. Bowman responded that they were having problems at the time, but Freeman nonetheless thought they should have loaded the barges. Bowman related that there was an argument between them. On the following day Guseman came up to Bowman and inquired as to what had happened. Bowman told him. Guseman then told Bowman that there was no reason why Bowman could not get along with Freeman, and that Guseman thought Freeman treated Bowman pretty good down there. Bowman agreed.<sup>11</sup>

Freeman testified that he had received vocational-technical and military maintenance training in auto motors, front-end loaders, trucks, and heavy equipment, and that over the years he had obtained other various certifications; viz, a state-certified welder certificate, an electrician's surfaces certificate, and gas detection, mine safety, and first aid certificates. Freeman related that he was

thus qualified to fill out the preshift (inspection) reports for Respondent, noting that such have to be additionally countersigned usually by Superintendent Guseman.<sup>12</sup> Freeman related in summary of his duties that he performs maintenance work on the equipment, welds and fits pipe, loads railroad cars and barges, checks the ponds, and shovels tailpieces, and that he knows how to run the scales and has on occasion weighed trucks (as have certain other employees). However, Freeman denied that he had authority to hire or fire employees. Freeman related that he arrives at work usually at 3 p.m., thus at a time when the Petittes and Guseman are there; and he asserts that they tell him what they want done, either directly or by note left at the scalehouse or passed on to him by Heller or office clerical Nikki Roggish, which he then passes on to the men, that he tells the men what to do because he is instructed to tell them what to do, and that one of the Petittes may direct him to see if the men will work overtime (and he will inquire), or on other occasions the Petittes may require the crew to work overtime, which he then only passes on to the crew.

Employee Roberson related that following his retirement from the military he was hired by Respondent, and that he has been employed by Respondent for a little over 2 years. During that period he has regularly worked as plant operator on the afternoon shift,<sup>13</sup> though he has also performed other work, including operating a highlift and doing some welding on the third shift. Roberson confirmed that he had received instructions directly and indirectly from Guseman or, after Heller left, from Roggish, and that employee duties were more or less routine. Roberson related that in the event of a plant shutdown he would notify Guseman. Other testimony of Roberson, however, then candidly acknowledged that Guseman was mostly present for only the first one-half hour of the afternoon shift; that normally Roberson received his orders from Freeman, who told Roberson what to do on the shift; that Freeman, from time to time, took him off one job and assigned him to another (e.g., from plant operation to running a highlift or loading barges or trucks); and that Roberson informed Freeman, who took Roberson's place with the end of shift, when

<sup>12</sup> In contrast, Heller made no such inspections, and testified that he had filled out the (routine) preshift reports for Foreman Casino, and signed Casino's name, at Casino's direction. Roggish in that respect testified that there was a preshift or shift report which supervisors had to keep and that she did not put any information in that book. Heller has also filled out the form for Freeman, which the latter then signed.

<sup>13</sup> Roberson described plant operation and his related duties as follows: Coal is fed into the plant through a hopper by a highlift operator, normally Trippitt, though Roberson and Freeman have on occasion also done this work. The plant itself is fed by conveyor belt, and coal is processed through a crusher and carried (out) by belt. The plant operator regulates the coal flow. However, Roberson also explained that, if coal is not continuously fed into the hopper, the plant itself has to be shut down, in sequence (bled down through a series of switches and valves), to minimize damage to the equipment. Thus, Roberson related that if he were to observe the highlift (feeding) operation shut down, he would contact the feeder by phone to determine what was wrong; and, if coal was not continued to be fed into the plant, Roberson would then automatically shut the plant down. If the situation were one where there was no coal to feed into the plant, it was also shut down, and employees would then do whatever maintenance work they could.

<sup>11</sup> Somewhat less convincing, because of the nature of the leading question eliciting it, was Bowman's additional testimony that Guseman explicitly stated to him (also) on this occasion that Freeman was the boss of the afternoon shift though Guseman had no recollection.

he needed to leave early. Thus, Roberson also testified that if the plant was shut down, and Freeman was present on the premises, Freeman was the one first notified, and that Freeman would then decide what maintenance work was to be done to get the plant back in operation, and whether Roberson was to do some other work or to go home. According to Roberson, if Freeman was not there, usually Guseman was. Otherwise he would leave word for Guseman or Freeman (or Casino) for further advice or instructions as to what he was to do; e.g., whether (in case of a highlift breakdown) to seek a highlift from another area, or whatever. Finally, Roberson revealingly testified that, though Freeman did more mechanical work and Guseman more supervisory work, the one job that Freeman did more than another was to oversee everything and check on what the afternoon shift was doing and whether they needed equipment, cars, or whatever; and that Freeman regularly told the afternoon-shift employees what they were to do, not vice versa.

Freeman, an hourly paid employee (unlike Heller), during the UMW strike which commenced on December 7, worked longer than other hourly employees, but only until December 21, before layoff. However, prior to the last raise received (effective April 4), Freeman was the highest paid hourly employee at \$7.75 an hour. Additionally, this record reveals that Freeman had initially rented a house from Pettite for \$200, but had since lived in the house without rent as part of his salary. (He has performed some caretaker functions and made some property improvements; and he has a first option to buy.)

Freeman himself has otherwise acknowledged that employees wanting time off have reported their leaving early to him; that on occasion he has worked the crew overtime on his own, e.g., to repair equipment when broken down; that he does spend most of his time moving around ensuring that plant operations are kept running; that he can charge parts up to \$100 on his own; that he has sent other employees out to get parts; that Guseman does rely on him to make sure the work for the afternoon shift gets done because Guseman knows that Freeman knows how to get things done; that the employees have openly referred to him as foreman; that he has told employees during a shift to do certain work; that on other occasions, e.g., the work having been completed, he and the crew have gone home early; and that employees regularly have asked him for raises, and he, in turn, has spoken to Guseman (or Pettite) on their behalf and in doing so has reported how the employees have been working.

Guseman, too, has acknowledged that he left instructions with Freeman (as he did with Casino) because Freeman got things done running the shift and usually saw to it that the work was done, and that the employees knew that Freeman was to let them know what they were to do, and understood that Freeman was the person whom Guseman was depending upon to get things done on the afternoon shift. Consistently, Guseman testified that it would not surprise him, nor would he regard it as unusual, that employee Roberson would approach Freeman with a request for personal time off, and Guseman (eventually and essentially) acknowledged that Freeman

had approached him at different times about raises for individual employees and Guseman had used Freeman's evaluations therein.<sup>14</sup> Finally, Pettite acknowledged that he had been aware that Freeman had let another employee leave early and had not subsequently reprimanded Freeman for doing so (indeed, Pettite had no reason to question Freeman's authority to do that); that he does have regard for the opinion of Freeman as to what is going on down there; and that he assumed that Guseman had talked to Freeman as to his opinion on wage increases; and that Guseman had used that opinion as a basis to establish wage increases.

This evidence and other evidence of record has thus wholly convinced me that prior to April 10 Jeff Freeman was more than simply a self-appointed working leadman.

Thus, this record makes it abundantly clear that Freeman regularly directed the afternoon-shift work force, and that he exercised independent judgment in doing so. Moreover, whatever may have been his personal and ability characteristics that led to his occupying such position, his performance in that capacity was with Respondent's clear awareness and equally clear implied concurrence and consent. It is also readily apparent that he otherwise exercised supervisory authority: In exercising his independent judgment in granting time off to individual employees; in occasionally regulating the usual hours of the shift, reducing them when slack, and working the shift overtime when desired (and warranted); and (I find) in effectively recommending pay increases for employees. Accordingly, I conclude and find that, during all times material herein prior to April 10, Jeff Freeman occupied the position of working foreman, and that Freeman was a supervisor within the meaning of the Act.<sup>15</sup> Having so reached this conclusion of supervisory status which carries with it an automatic exclusion from the appropriate unit herein, I need not reach other arguments advanced by the General Counsel and the Union herein that Freeman during material times occupied a special status with Respondent which carried with it substantial interests so divergent from the interests of other unit em-

<sup>14</sup> Guseman testified that he had to confer with Pettite, and usually did so, though he also asserts that he did not do so before granting certain raises to Freeman, Tennant, and Roberson (effective April 4), discussed *infra*. Although at one point asserting that he did not recall discussing the matter (of granting raises) with Freeman, asserting rather that he used his own judgment, Guseman then otherwise testified, and I find much more plausibly so on this entire record, that, since Freeman worked more with the employees than he did, it was possible that he would have asked Freeman what Freeman thought, and that he had used it (Freeman's evaluation) in formulating whether he (Guseman) should go on to Pettite to get an increase approved.

<sup>15</sup> Additional record evidence of actions taken subsequent to April 10 only buttress such conclusion. Thus, on Friday, April 13, as discussed *infra*, Freeman delivered discharge letters to employees Bowman and Trippitt. Pettite would seek to minimize this action as the mere carrying out of an instruction given an employee, as with Heller, also discussed *infra*. I disagree with such a cavalier view of that circumstance. The record fact is that it was Freeman who brought his crew employees (Trippitt and Bowman) to the office and there notified them of their discharge; as notably also did Foreman Casino the next day to Heller, and Guseman the following day to Eddy. I further note in passing that Pettite acknowledged that he was aware that Freeman more recently sent an independent truckdriver home for engaging in horseplay, an action which was neither countermanded by Guseman nor censured subsequently by Pettite.



ployees as to reflect a lack of community of interest with those unit employees and consequently clear warrant for Freeman's exclusion from the unit on that account alone.<sup>16</sup>

## 2. Richard G. Heller

Heller was initially hired by Respondent in November 1976, and worked as a scaleman or weighmaster until he was initially laid off on February 24. Heller describes the weighmaster's duties as follows: Essentially his duties included the daily weighing and recording of all coal tonnages that came in by (triaxle) dump truck from individual supply mine sources; and the daily recording of such coal tonnages as were shipped out to Respondent's industrial customers in barges and railroad cars. In regard to such shipments, recordings were regularly made by Heller as to the identity and number of barges that arrived, were loaded, and then pulled away by tugboat, as well the identity and number of railroad cars similarly received, loaded, and pulled away. Correlatively, Heller's duties involved notifying a tugboat dispatcher in Pittsburgh, Pennsylvania, who would arrange for a tug to pull the barges readied for shipment. According to Heller, railroad cars were scheduled for departure on a certain day and routinely readied in advance thereof. In contrast with other unit employees who worked out in the yard or in the preparation plant, Heller essentially conducted most of his duties at the scalehouse, working at a desk or standing behind scales. Heller's duties included making entries in two daily forms, *viz*, a daily mine report and a daily report, on which he entered essentially the above coal tonnages received and shipped and employee (general) attendance clarifying, however, that he kept such employee attendance records regularly only for the day shift.<sup>17</sup> Heller's additional responsibility

was to total up the shift hours that were worked by the day shift and forward the same to the office. Heller would receive relevant informational input from Guseman or Casino, from his personal observation, or from the employee directly. Heller testified credibly (I find) that, if he had a question as to when an employee had left for the day, he would simply inquire of supervision. While employees would turn in their written excuses for absences to Heller (e.g., from a doctor), Heller testified that he would just (as the form directed) attach and forward them, or, in the case of an oral excuse, he would make a notation of the offered excuse when and as advised by the employee. However, Heller testified that he had no authority to approve or disapprove of any absence excuse, nor to reprimand or to discipline any employee therefor, but his function was only to note and forward the same to the office.

Respondent's operations also occasionally involved trucking of coal on its premises from a hillside processing tipple, in connection with the loading of railcars or barges, or from stock areas. In that connection, Heller would contact certain truckers by phone to provide such services when directed. In that regard, however, Respondent maintained a telephone file on such truckers to whom Heller would place random calls until Heller had secured the specified number of truckers. However, Heller testified that he had no authority to establish for Respondent rates at which these truckers were to be paid. It is uncontested that none of these truckdrivers was paid for his services when provided as employees of Respondent. Moreover, I find on the record before me that they were not employees of Respondent but rather independent contractors. Heller also had certain responsibilities in the testing of coal samples, which required someone (Heller or another) to go out to the yard and obtain a sample from the coal stock. Heller would bring the sample back to the scalehouse, and then notify the test lab to pick up the samples for testing. Testing results would be subsequently phoned back to Heller, who would then pass the results on to Guseman or to the Pettites. However, Heller testified without apparent contradiction (and he is otherwise supported by the record) that it was certain members of Respondent's management who determined what coal was to be sampled and tested and when such was to be done.

Heller normally worked regular day-shift hours (7 a.m. to 3 p.m.) though he was given a standing instruction by Pettite that he was to work until 5 p.m. when required to handle coal trucks scheduled to arrive later (principally hauling from outside coal producers). Prior to February 24, Heller was paid a salary of \$525 biweekly (without overtime), which may be compared with (admitted) day-

<sup>16</sup> Essentially the record does establish that Freeman during material times had occupied a mutually beneficial and increasingly significant separate business relationship with Respondent. Thus, Pettite acknowledged that in the past 2 years Freeman has been independently contracted two-three times to perform work for Respondent, e.g., to build (weld and install) iron pipe gates, and further acknowledged that Freeman as Freeman Welding Service had done welding work for other Pettite interests, including welding work on a strip job in Pennsylvania for the Pettites. The record reveals as well that Freeman Welding Service has performed welding work for other independent concerns (all with conceded business relationships with Pettite). More materially and significantly, Freeman had personally contracted with Pettite to refurbish the river tipple for Respondent about April 1979. (Since Pettite recalled that the job took 2-1/2 months to complete and he otherwise related that the refurbished tipple had been in operation for 5-6 months at the time of the hearing, it would appear that this work had begun sometime in April 1979.) Freeman, in turn, acknowledged that he had an independent business which is known as Freeman Welding Service; and which pursuant to an oral contract had supplied Respondent, *inter alia*, with a welding crew and equipment for an agreed price, with Respondent purchasing required supplies. The record reveals that on the tipple job Freeman himself worked (welded) from 7 a.m. to 3 p.m. (and on weekends) as Freeman Welding Service, and then on weekdays at 3 p.m. continued in the same work (excepting interruption for other required repairs) on Respondent's payroll at his usual hourly rate. Freeman, as Freeman Welding Service, had also provided extra work to other employees of Respondent by employing them to do this work on weekends, all with at least Respondent's awareness.

<sup>17</sup> As described by Respondent's controller, Frabutt, the above reports, examples of which (post April 19) are in evidence, are a two-page daily record. According to Frabutt, the first page entitled "Daily Mine Report" served as a daily employee status report and an employee per-

sonnel file for Respondent in that it listed (generally) the number of man-hours worked per shift, any individual absences and reasons therefor, and the superintendent's time. The second page entitled "Daily Report" is a record of the tonnages, which he referenced as being Respondent's sole documentation of coal production received from the mines (apparently excepting actual weigh slips, copies of which Roggish testified she retained at the scalehouse), and, in any event, which also served as customer billing input for the coal tonnages shipped out by rail and barge. Frabutt also testified that these reports were used by him in the preparation of cost analyses; e.g., tons (loaded) per man.

shift Foreman Casino's biweekly salary rate of \$1,000.<sup>18</sup> Heller also testified that he (unlike Roggish who succeeded him as weighmaster) occasionally performed some operator jobs, including repair work. Although Petite related that Heller had no experience running the plant and loading barges and Heller himself acknowledged that he performed operator work on the belt and repair work infrequently, Heller did testify without convincing contradiction that he did do some operator work or did help operate equipment sometimes (on Saturday). In any event, Heller has otherwise testified convincingly, and I find, that he had work-related contact with other unit employees every day.

Heller was notified by Petite that he was to be laid off as of Saturday, February 24. At that time a supply mine which had supplied coal for the processing tippie was closed. According to Heller, Petite advised Heller at that time that it might be 2 weeks or more before Heller would be hired back, and told Heller that it would not be held against him if Heller looked for work elsewhere. Heller was the only yard employee on the day or afternoon shift who was laid off. (There was no third shift working at this time.)

Petite confirmed that in early 1979 he had to shut down the Jasper Coal Company mine for economic reasons and he related that this condition led him to make certain other changes in his office staff. Thus, Petite testified that he released one (of four) office clerical outright and transferred another office clerical, Nikki Roggish, who had prior experience as a weighmaster, to take Heller's place as weighmaster.<sup>19</sup> Petite's version of Heller's layoff announcement and arrangements made with him at the time was that Petite approached Heller at the scalehouse and informed Heller that due to market conditions Petite was going to have to cut back. According to Petite, Heller was not surprised as he could see the coal piling up at the time. Petite told Heller that due to personal reasons, *viz.*, that some of the office staff were friends of the family, Petite was going to have to reshuffle them, and he was going to have to lay Heller off effective that Saturday, February 24. However, Petite told Heller that he had done a good job; that Heller was subject to recall when the market picked up, which Petite thought would be in 2-3 weeks; and that Petite was going to give Heller \$300 (which he later increased that afternoon to \$500) to tide Heller over. According to Petite, he also told Heller that he would probably give Heller a sizeable increase in salary when he returned, if the market warranted, to help make up for money Heller lost. This latter alleged promise of a future compensable

loss increase on his return is a matter of major factual dispute by Heller. Thus, although not contesting Petite's testimony that Heller was given \$500 at the time of his layoff to tide him over, Heller testified that Petite did not at the time specify what job he might be recalled for, and Heller categorically denied that Petite had at that time promised Heller a new salary, let alone \$1,280 biweekly when he returned as weighmaster.

After about 5 weeks of layoff, Heller was recalled for employment on March 29, though not as weighmaster, but for yardwork. Whether recalled as a general yardman as such, or as a feeder operator, it is clear that shortly upon his return Heller began running a front-end loader, working as a feeder operator, and performing the same work as had been performed by the recently injured day-shift employee, James Fain. For this work Heller was paid at the rate of \$5.50 per hour (the same as Fain), and he received overtime. Heller testified without contradiction that when foreman Casino notified him of the recall to fill Fain's job Heller inquired of Casino what Heller would do when Fain returned, and that Casino replied only that they would have to wait and see. Thus, Heller asserts that at the time he took the yardman job he actually did not know if he would be again employed as the weighmaster. However, I find that such employment was temporary.<sup>20</sup>

Petite testified without subsequent contradiction that it was approximately after the third week of Heller's layoff that Heller started showing up at the yard looking for work. According to Petite, Guseman and Casino (who had such authority) hired Heller back, without Petite's prior awareness, to help Heller over a financial crisis. Petite testified otherwise that he had (always) intended to call Heller back as a scaleman.

During her periods of employment as weighmaster, discussed *infra*, Roggish essentially comparably described her duties as weighmaster as follows: Roggish kept daily records of how many hours each employee worked, noting who was off and why and if they called in. She also prepared the daily tonnage reports. She weighed the coal on incoming trucks, recorded it, and on the following day added the totals up. At the end of the month she turned the records into the main office, keeping, however, a copy of weigh slips at the scalehouse. The office would then pay for the coal bought. Roggish testified that she also would call truckers when needed, relating, however, that she decided which truckers to call, though also acknowledging that she did so only from a group who had worked for Respondent in the past.

<sup>18</sup> The record does reveal that, during a UMW strike in the general coal mining industry which occurred a year earlier, Heller was continued on salary during its duration (as were all salaried employees).

<sup>19</sup> Roggish had been in the Petites' employment for 7 years, and only since May 1978 working as a payroll and accounts payable office clerical. Prior to that Roggish had worked as a weighmaster in another Petite operation. (Heller had thus been more recently employed as such.) Roggish recalled that it was about the middle of February that Petite told Roggish that he was cutting back on the work force, and told her that, since she had previously worked as a weighmaster, he wanted her to go down and weigh coal. She recalled that she worked there until Heller (following interim employment in the yard) came back as the weighmaster, and that she subsequently returned there to work with him only a few days before Heller quit on May 21.

<sup>20</sup> Petite did not deny that employer motivation existed to fill in for the injured Fain. Guseman did not testify as to this matter, and Casino did not testify at all. I am convinced that Heller was reemployed by Casino, as Heller essentially related, to do Fain's work until he recovered, though such employment was no doubt mutually beneficial to him. I conclude that Casino was noncommittal about Heller's future employment because the duration of Fain's absence and future economic conditions were probably not then compatibly discernible to him. I do conclude and find, however, on the evidence before me, both that Heller's interim employment in the yard was temporary employment, and that he retained, as earlier informed by Petite that he would have (and confirmed by Petite), an expectancy of recall from layoff to the position of weighmaster in the reasonably foreseeable future.

Roggish also placed calls to determine when and how many barges Respondent was going to get, and she notified the barge gauger when barges were loaded and ready to be pulled. She maintained the barge book which records barge numbers, when in, when out, and their gauge. Roggish testified that she also made similar calls in regard to railroad cars' availability and maintained certain records thereon (for her own use) and on the railroad cars' numbers and shipments. According to Roggish (unlike Heller), the weighmaster would always know where the barge or railroad car was going, and thus would know to whom the coal was to be shipped.

Since mid-summer Roggish has kept all such records locked in a file unavailable to others (with the exception of Casino at night), explaining generally that the work force has no need for them and she does not want them lost or misplaced. Unlike Heller, Roggish related that while serving as weighmaster she never operated any equipment, shoveled tailpieces, or did any other blue collar work.

### 3. Party contentions and analysis

According to Petite, as of January 1979, in addition to the operational supervisory direction that was provided day-shift employees by himself, his brother Jasper Petite, Superintendent Guseman, and (admitted) day-shift Foreman James Casino, Petite would have one of the (then) five other day-shift employees *viz*, Richard Heller, also concluded to be a supervisor or part of management because Heller, as weighmaster, have access to certain (daily) purchase and sale tonnage information which Petite regarded as important to management and thus confidential, and because Heller was in charge of arranging for the coal testing and reporting the results to him. In further support Petite also related that from his office (200 yards away) he could oversee the yard, and that on occasion when he observed a problem developing he had Heller inquire what the problem was and/or had Heller deliver instructions to the work crew. In its brief Respondent additionally argues that the above business information which Heller regularly gathered would be invaluable to the Union in any decision to strike. Respondent thus contends that Heller meets the Board's definition of a confidential employee, citing *The B. F. Goodrich Company*, 115 NLRB 722 (1956), in that Heller, in collecting such confidential information concerning the coal yard, assists or acts in a confidential capacity to Petite, who unquestionably formulates, determines, and effectuates management's policies in the field of labor relations. Alternatively, Respondent contends on brief that Heller should be excluded as a managerial employee because (by work function) Heller was so closely related to management as to place him in a position of conflict of interest between Respondent and fellow workers, and/or because Heller formulated and effectuated Respondent's policies or had independent discretion thereon, relying on *Illinois State Journal Register, Inc. v. N.L.R.B.*, 412 F.2d 37 (7th Cir. 1969). Finally, Respondent would alternatively exclude Heller as an office clerical. Respondent thus argues that Heller's union card designation made while only temporarily employed in the yard before returning to his regular position of weighmaster (an office

clerical position) should not be counted. Respondent (at the hearing) made certain additional arguments as to Heller's contended supervisory position occupied in February resting on certain documents Heller executed in May.

The General Counsel would appear to correctly concede on the facts established herein, and, in any event, I conclude (on the basis of findings made *supra*) that it is proper herein to assess Heller's unit placement only by evaluation of his weighmaster's duties, a position, as noted, with which Respondent would appear to be in essential agreement. Both the General Counsel and the Union reserve that the same issue is not to be resolved on the basis of (contended) self-serving changes made by Respondent in that position after the Union's demand for recognition, Respondent's admittedly discriminatory discharge of Heller, and the latter's eventual reemployment.<sup>21</sup>

I first address Respondent's urged exclusion of Heller on the basis of the claimed confidentiality of his position. The critical consideration for exclusion of Heller as a confidential employee is not whether there is some work contact by the employee touching upon, or even directly involving, what may in some business sense be regarded as sensitive business information. Mere access to production records, receiving and shipping information (purchases and sales), or what may be regarded by the employer in some other business aspect as entailing sensitive data and/or information is much too broad a base of disenfranchisement of employees from their collective-bargaining statutory rights, and thus the same has been previously held insufficient by itself to render an employee excludable as a confidential employee. *Aeronca, Inc.*, 221 NLRB 326, 330 (1975); *Ohio State Legal Services Association*, 239 NLRB 594 (1978). The critical consideration rather is how the employee operates and functions by assignment for the employer in relationship to a certain kind of sensitive business information, *viz*, whether it affirmatively appears that the employee performs work in essentially a confidential capacity for a person while the latter is engaged in the exercise of "managerial" functions in the field of labor relations. Cf. *Ernst & Ernst Na-*

<sup>21</sup> The General Counsel would appear to correctly observe that, if Heller's initial recall from layoff is shown to be one of only temporary assignment to a yardman position (albeit the same is included in the unit), under existing Board precedent such would not displace the basic issues of both unit placement and the efficacy of Heller's designation of the Union while occupying such temporary position as nonetheless necessarily to be resolved on the showing to be made of Heller's substantial and continuing community of interest in other unit employees' terms and conditions of employment by virtue of Heller's (prior and reasonable expectation of recall to) permanent position as weighmaster (*Willett Motor Coach Co., et al.*, 227 NLRB 882 (1977); *Eastern Rock Products, Inc.*, 239 NLRB 892, 893, fn. 5 (1978)), and further correctly notes that, vice versa, employee Roggish at material times was thus shown only as temporarily employed in Heller's place as weighmaster, with her own (uncontested) anticipated return to her prior permanent position of office clerical. Thus, Roggish is to be excluded from the unit as an office clerical. *Honolulu Sporting Goods Co., Ltd., a subsidiary of Zale Corporation*, 239 NLRB 1277, 1281-82 (1979); *The Trustee of the Stevens Institute of Technology*, 222 NLRB 16 (1976). Moreover, to any extent the Union would in effect contend to the contrary in urging that a count of Heller's union representation designation is warranted since it was made while he was a yardman, e.g., even if, and as I have found was the case shown, only temporarily so recalled and assigned, I would reject same.

*tional Warehouse*, 228 NLRB 590, 591 (1977). I can discern no such showing made herein, and I find that Heller possessed no more sensitive business information in the performance of his work functions as weighmaster, than shipping, receiving, and other production clerks and, indeed, office clerical employees heretofore have been shown to possess without loss of their statutory rights. I thus conclude and find that Heller, while working in (and with expectancy of recall to) the weighmaster position prior to April 10, was not employed in a confidential capacity to Petite or any other managerial official.

Similarly, managerial status itself is not to be engrafted on truly rank-and-file workers to the detriment of their established statutory rights. Thus, even discretionary but essentially routine work performances are to be differentiated. As the Board has stated, managerial status properly is to be "reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management." *Lockheed-California Company, a Division of Lockheed Aircraft Corporation*, 217 NLRB 573, 574 (1975). Indeed, with Supreme Court approval, the Board has defined managerial employees as those "who formulate, determine, and effectuate an employer's policies." *N.L.R.B. v. Bell Aerospace Company, a Division of Textron, Inc.*, 416 U.S. 267 (1974); *Eastern Camera and Photo Corp.*, 140 NLRB 569, 571 (1963). It is clear on this record that Heller's function in arranging coal sample testing and in relaying test results to management was but perfunctory. I am as well convinced and I find that Heller's contacting of the nonemployee independent truckers to perform services for Respondent did not involve exercise of managerial skill, rather involved only a routine phone contact of a preexisting pool of truckers who had previously agreed to provide services to Respondent on such call and at rates and conditions set by others. I thus conclude and find that Heller's work activities and functions in relation to both coal sample testing and independent trucker contact were not such as to constitute him a managerial employee in the performance of his duties as weighmaster.

Respondent's contentions in regard to the office clerical status of the weighmaster are no more persuasive, and need not be belabored beyond noting that Roggish was selected to temporarily replace Heller not because of her prior performance of office clerical duties, but because Roggish was a long time employee who had had more service, including significant experience in service of the Petite's interests as a weighmaster. That she may have additionally also occupied a favored position as a friend of the Petites in the small family-run operation does not call for a different conclusion.

Apart from arguments based on certain documents and related action executed or occurring after the admitted discriminatory discharge, and/or questioned as self-serving, there is no convincing evidence herein of any statutory supervisory conferral of power to, or exercise of power by, Heller (or Roggish) while working at material times as weighmaster. In that regard it is clear beyond question that Heller, in delivering an occasional work direction for Petite, was acting as a conduit of instructions and exercised no independent judgment in the execution or responsibility for completion thereof, and as we have

seen, that this was quite different from the case of Freeman on the afternoon shift who worked largely in the absence of other supervision and who was personally looked to by the superintendent to get the work done. The circumstance that an employee is salaried is not the dispositive factor of supervisory status is too long and well established to occasion even need for citation of supporting authority. What emerges clearly from the above is that the weighmaster's duties in this material period were essentially that of a scale operator weighing incoming coal and/or a shipping and receiving or plant clerical recording certain raw material receipt and production shipment data. In regard to the former the circumstance that Heller would take various action, including, pursuant to instruction, rejection of a defective raw material delivery (only) from an outside source, did not make him any more supervisory in function than was the case with other receiving clerks who acted similarly in refusing to accept obviously damaged, defective, or unordered supplies for the Respondent.

Sufficient showing of a community of interest with other unit employees such as to warrant inclusion of the weighmaster position in the unit is clearly made out in the employees' common supervision, daily work contact, and enjoyment of the same employee benefits, and, indeed, the essentially similar work hours. I am thus further wholly convinced, and I conclude and find, that the work functions and duties of the weighmaster as depicted above were those of a scaleman with other duties essentially similar to those of a shipping and receiving clerk and/or a plant clerical and thus includable in the production and maintenance unit herein, unless the certain post-demand and (admitted) post-discriminatory discharge evidence is to be deemed such as to convince nonetheless that Heller, as weighmaster, had earlier occupied a supervisory position. From that remaining issue I momentarily digress (necessarily) for development of the context of the employees' union activity and Respondent's alleged unlawful reaction thereto. In passing, I would only presently observe that, if there is no such convincing evidence that Heller was a supervisor earlier, the record has established that the Union occupied a collective-bargaining representative status at the time of its demand on April 19 and, indeed, earlier on April 10.

#### D. The Alleged Unfair Labor Practices

##### 1. The commencement of union activity

Prior to February 19, Clifford Bonnett had served as recording secretary and/or an officer of the Local Union for 15 years, and was employed by Christopher Coal Company, a Division of Consolidated Coal Company, as a pilot operating the tugboat *Donna Lee* on the afternoon shift (4 p.m. to 12). (Bowman Sr. operated the tugboat in that period, normally on the night shift (12 to 8 a.m.) but occasionally on the afternoon shift.) On February 19 Bonnett resigned from his positions to become an organizer for the International Union from February 19 until he resigned from that position to return to his prior employment on the tugboat on June 15, but he has not returned to the present holding of any Office in the Local

Union. Leonize "Dutch" Morris became employed as an International organizer also on February 19, and he has remained such to date.

Bonnett recalled it as being one evening in late January or early February that Freeman visited the *Donna Lee* with a request for some tugboat assistance, and that while there Freeman spoke with Bonnett about the Union. Bonnett's version is that Freeman mentioned his understanding that Bonnett was going to become an organizer for the International Union. Bonnett replied that he might do so. According to Bonnett, Freeman asked Bonnett to come down and organize Respondent's employees first. Bonnett replied that he would try to do so. Bonnett testified that he did not know that Freeman was a foreman at the time, but that he considered him to be "like a pusher." Bonnett asked Freeman on that occasion to give him a list of the names of Respondent's employees and their phone numbers, and Freeman at the time promised Bonnett that he would. Freeman admitted visits to the tugboat (with Bowman) but denied that he asked Bonnett to organize Respondent's employees, and his version is that employee Bowman was with him at the time and that they were "razzed" for being non-union. Morris testified that on February 23 both he and Bonnett traveled together to attend an orientation program arranged by the International Union for its new organizers, and he recalled that Bonnett mentioned to him on that occasion that afterwards they were going to go to Respondent first, because of the conversation he had with Freeman.

Bonnett testified that after he became an organizer he called Freeman on the phone and notified Freeman that he had become an organizer and inquired of Freeman whether Freeman had gotten the list for him. Freeman said that he had not, but that he would as soon as he could get up to the office. Bonnett related that Freeman never thereafter supplied a list, and that he did not call Freeman again because he figured that Freeman was not going to get it for him. However, Bonnett, when specifically questioned, related that he had made such a call to Freeman at the end of March. Freeman does not deny a Bonnett contact about a list of names, addresses, and phone numbers. Thus, Freeman confirmed that Bonnett, at a time that Bonnett was known by Freeman to have become an organizer, thus necessarily after February 19, had contacted Freeman at his home to get a list of the names, etc., of employees. What is in issue is not whether Freeman came to know that an active union campaign was under way, but when he first knew of it and its effect.

Morris testified that he assisted Bonnett in the organizing of Respondent's employees, and he placed the start of the campaign at the end of February rather than the end of March. Notably, however, he described the start of their organizational efforts as with but *some* names and it being *after* Bonnett had contacted Freeman. Morris thus testified (generally) that, after Bonnett talked to Freeman, they got some names; that he, around February 27-28, started visiting and talking to employees at their homes, at bars, and at churches; and that, as they went along, they got the names of all the employees. Morris also testified that eventually he had talked to all

the employees, that he had found that seven of the nine employees he had calculated to be in the unit were agreeable to the Union, and that thereafter the union representatives obtained and witnessed six authorization card signings by employees who designated the Union as their collective-bargaining representative. The union cards were obtained from employees at their individual homes on April 9, 10, and 11. (In the referenced six cards signed, Morris has included the card of Long, the only one signed on April 11.) As found materially significant herein, Morris testified that a seventh employee who had earlier also favored the Union was James Fain, who had been at this time shot and hospitalized.

Thus, aside from dates, in summary and essentially, the Union's organizational movement took the form of various successive individual contacts with employees in which the Union ascertained the identity of unit employees, explained the Union to the employees, first explored with employees those in favor of the Union, and then obtained in a few days from individual employees at their homes majority designation evidenced by authorization cards signed in the second week of April, viz, on April 9 (Bowman) and April 10 (Heller, Roberson, Trippitt, and Eddy). The only seeming appearance of inconsistency bears limitedly on when the organizational efforts started; viz, the end of February as Morris specifically recalled though in circumstances suggestive of being after a Bonnett-Freeman contact, or the end of March as Bonnett at least on one occasion stated was the time of his sole followup contact with Freeman. Bowman, Heller, Trippitt, and Eddy confirmed signing their union cards on those respective dates under circumstances I find conclusive of their validity, and Roberson, called as a witness by Respondent, did not deny same. The validity of the card designations on those dates is not in any sense in question, but Freeman's contact as to an actual campaign undertaking and Respondent's first awareness of the union activity of its employees are in issue, as the same bears upon certain wage increases granted in early April.

## 2. The April wage increases

The record reveals that day-shift machine operator Howard Tennant received a 25-cent wage increase, and that afternoon-shift plant operator Kenneth Roberson and Freeman each first received a 50-cent wage increase, all being made effective April 4. The remaining employees received wage increases effective April 18 as follows: On the day shift,<sup>22</sup> Willard Eddy—25 cents, Dennis Ingersoll—35 cents, William Elliott—25 cents, and James Fain—\$1.50; and, on the afternoon shift, Charles Trippitt and Earl Bowman—50 cents each.

Bowman testified that the afternoon shift received their raises on April 10. Thus, Bowman related that they were called to the scalehouse. Petite and Freeman were there. Petite told them it was time for a raise, saying he thought they deserved one. They then went to the supply room where Petite had a paper with the names of the employees and what they were making. Bowman

<sup>22</sup> Richard E. Heller, returning to employment under special circumstances to be described *infra*, was shown as receiving a biweekly salary of \$590.77, also effective April 18.

then at \$5.75 received a 50-cent raise to \$6.25. Pettite said the raise would go into effect the following pay period (and the payroll shows that it was effective on April 18). Bowman testified that in that respect this increase was implemented differently from his last raise received which had been put into effect immediately. Trippitt confirmed that on April 10 when he went to work Freeman told him that there was to be a meeting for employees in the scalehouse. When Trippitt arrived he found that other afternoon-shift employees (Bowman and Roberson) were also there, as was Pettite. Pettite showed Trippitt his raise on a piece of paper, and he told Trippitt that he would not get it the coming paycheck, but that it would be in the following paycheck. Trippitt also was raised 50 cents from \$5.75 to \$6.25.<sup>23</sup> (It appears that Trippitt had already signed his authorization card.) Day-shift employee Eddy related that it was not until April 11 at 9:30 a.m. that Pettite had come down to the river and informed Eddy that he had put Eddy in for a raise. Eddy asked how much and was told 25 cents. Eddy asked when (the effective date), and was also told by Pettite that it would not be in this paycheck. (Eddy was raised from \$6.75 to \$7, effective April 18.) According to Eddy, Pettite also told him that, if things went good or continued to go as well as they were then, Eddy would receive another raise in 6-8 months. (Eddy, first employed in 1974, testified that he had received several raises prior to this time, the last such being received but 2-3 months earlier.) On the previous day, April 10, after work, Eddy had signed his authorization card for the Union.

### 3. The alleged earlier interrogation and threats by Freeman

Trippitt related that he had a conversation with Freeman earlier about the Union which Trippitt placed about the end of March, though it is noted in passing that the record has revealed some unreliability in Trippitt in recalling dates. According to Trippitt's recollection otherwise, Freeman spoke to Trippitt in the basement of the plant, and asked Trippitt if he had signed a union card. Trippitt answered no. Freeman then told Trippitt that there would be no union; that he might as well forget it; and that the Petittes, or the Pettite brothers, would "put their hardhats on and run the place themselves, they had put them on before and would do them [sic] again."<sup>24</sup> Bowman also testified that it was a few days before he signed his card on April 9 that Freeman informed Bowman that Freeman had told Superintendent Guseman that the union organizer had been around talking to the employees. According to Bowman, it was later that he told Freeman that he had signed a card. Significantly, Bowman also testified that it was a day or so after he

had signed the union card, and at quitting time at the plant while he was waiting for Roberson to finish, that Freeman had told Bowman and Trippitt that they might just as well forget about the Union because the Petittes were going to put their hardhats on themselves and run the business, and that Freeman had told him that before the Petittes went union they would put their own hardhats on and run it themselves.

Freeman's version was that he thought it was April 10 but he otherwise confirmed that he had told both Trippitt and Bowman that they might just as well forget this Union as the Petittes would just put on their hardhats and "toes" and go back to work if worse got to worse. However, Freeman denied that he was instructed to do so by Respondent. Freeman also confirmed that in April Earl Bowman had told Freeman that he had signed a card, and Freeman testified that he later told Guseman in the shower house that he had heard talk about the Union, and that the employees were trying to organize. Freeman said that Guseman replied that it was not the first time, but that he had then inquired what made Freeman think that. Freeman then told Guseman that Bowman had signed a card. Freeman testified that the next day, which he recalls as April 12, he repeated the information to Jasper Pettite. Thus, Freeman would have his notice to Guseman of employees' union activities given only after all the wage increases were announced. However, Bowman, a credible witness, testified that Freeman had already, a few days before April 9, told Guseman that the union organizer had been around talking to the employees. Moreover, this record reveals that Freeman had initially testified that he had only first learned of the union activity in April after the employees were fired, and it was only after reflection overnight that he then related he recalled he first found out in February and then otherwise testified, *inter alia*, as above noted, including that Bonnett had earlier asked him for a list of names, etc., and his conversation with the employees, Guseman, and Jasper Pettite. Under these circumstances Freeman's relations as to his first awareness and contact with the Union must be concluded to have been simply something less than initially candid, and his other denials and account appear much the more questionable. I credit Bowman that Freeman told Bowman earlier that he had alerted Guseman of union activity prior to the announced April 10 wage increases, though it would appear to have been after the April 4 wage increases were effective. However, I am convinced by the above circumstances, and in the light of subsequent events, that it was late on April 10 (thus after raises were announced) that Freeman told both Trippitt and Bowman in substance and effect that they should forget about the Union, and also that it is more probable than not that it was on that occasion that Bowman told Freeman he had already signed a card for the Union, and Freeman asked Trippitt if he had done so.

<sup>23</sup> Trippitt related that he also believed that Pettite at the time had said that he did not know why he had decided to give us a raise, but he did. In my view, the remark, even if spoken as recalled, is too cryptic to be of significance.

<sup>24</sup> Respondent also established that, in a prior statement obtained by the Union, Trippitt had referred to Jasper Pettite as having been said to have made the above statement, but at the hearing Trippitt related and maintained in his testimony that his recollection was that Freeman had stated it more generally as the Petittes or the Pettite brothers. In view of Bowman's corroboration the variance is not significant.

#### 4. Respondent's offered explanations

##### a. *The increases granted—a normal annual increase keyed to union operation increases*

David Frabutt, a West Virginia CPA, has been employed as controller for Maidsville Coal since March 1977. Though paid by Respondent, he does work for the Pettite brothers' related companies as well, including Pettite Brothers Mining Co., Inc., a union mine operation owned by Johnny and Jasper Pettite (and one other individual), and Electra Fuels, Inc., a wholly owned subsidiary of Respondent which operates a nonunion mine. Frabutt's responsibilities include preparation of financial statements and corporate returns, and he testified that he is also involved in wage discussions for employees of the above companies. An annual raise (as Frabutt described it) was granted to Respondent's employees in November 1977. It was Frabutt's further understanding that there was a general policy to try to give annual raises at the nonunion operations when union operations received one. In that connection, a UMW strike occurred shortly thereafter, on December 7, 1977, and lasted until March 28, 1978, at which time a new BCOA agreement was reached between the UMW and coal producers with certain raises being received by contractually covered employees in March 1978 and thus at the Pettite Brothers union operations. Frabutt testified however, that it was financially impossible at that time for Respondent to give its tipple employees a raise, but that it did subsequently grant an across-the-board raise to them on May 24, 1978.<sup>25</sup> There was no further raise granted that year.

In 1979 the BCOA's next contractual date for a raise was (apparently) again the end of March. It appears uncontested of record that Electra Fuels' employees received at least a partial wage increase the first week of April.<sup>26</sup> In any event, Frabutt's recollection was that there were further discussions on April 10 for raises for Respondent's employees; that it was on April 11 that the employees were formally notified that they were to receive raises and that their raise was to be effective April 18. However, Frabutt elsewhere testified that there were even earlier wage discussions, and it was during such wage discussions on 4 days before April 12 (thus April 8 or 9) that he first found out that Guseman had already given raises to three employees of Respondent, with grants effective April 4. (Mechanically, such raises would be put in relatively simply by telling payroll clerk Cyzick the new rates to be applied.)

The record in its entirety will simply not support Respondent's contention that it has granted annual raises regularly or at the time union operations received them, but at best indicates that the timing of increases received by union operations were a factor considered. Employees

testified that they had never heard of an annual wage increase, that they knew of no set time for their raises, and that the superintendent or foreman would just put the employee in for a raise and it came in the next paycheck, and there are individual instances of such evidence in the record. Indeed, Frabutt conceded as much in testifying that it (e.g., an annual wage increase keyed to the time of a union wage increase) was not a formal written policy, acknowledged that supervisors were not told of it, admitted that Respondent was not tied to it, and eventually and significantly testified that both a wage increase grant and the amount of same was always up to Johnny Pettite.

Frabutt also testified that he and Respondent were perplexed over the three earlier wage increases granted by Guseman, their having been given prior to the time when an asserted (annual) increase would be up for consideration, that he would have believed that Guseman did not have authority to do so without Pettite's knowledge, and that he did not know why Guseman did not first talk it over with Pettite. According to Frabutt, there was no discussion of the Union in his conversations about wage increases, and he related that his first awareness of employee union activity was shortly before he read the Union's demand letter of April 19, thus clearly later than Guseman and Pettite knew of it.

##### b. *Claimed existence of a standard wage for a plant operator and individual action by Guseman as to the first three raises*

Freeman testified that in February he had asked for a raise, and that subsequently he, Tennant (day shift), and Roberson (afternoon shift) received one effective April 4. Roberson testified only generally that he normally would ask Guseman for a raise, but also that he mentioned to Freeman that he was due for a raise, or something to that effect, because Freeman was in the chain of command. Tennant did not testify.

In explaining his wage increase grant to Roberson, Guseman asserted that there was a standard wage for a plant operator, and that Freeman came to Guseman on several occasions with Roberson (who had been operating the plant for some time) and stated that Roberson had been asking when he was going to be brought up to the standard wage.<sup>27</sup> Guseman related that Freeman and Tennant had also asked him on several occasions for a raise. According to Guseman, he simply decided to give them a raise at this time. Guseman further asserted that he did so on his own without consulting Pettite, though he also acknowledged that it was unusual; indeed, on this record, it was not shown to have been done theretofore. In what must be deemed equally unusual, Guseman could not even recall whether Pettite was upset when Pettite found out about the raises he had granted to Freeman, Roberson, and Tennant. Day-shift plant operator Dennis Ingersoll, hired on April 9, 1977, prior to the last increase granted, was paid at the rate of \$7.50 as compared with the \$6.25 of Roberson who was hired on

<sup>25</sup> Respondent had operated until December 15, 1977, at which time its hourly work force was essentially laid off until the completion of the strike, returning to work on March 28, 1978. Frabutt related that in the interim Respondent's two superintendents (whom he identified as Guseman and Heller) had continued on salary and had acted as guards visiting the tipple. However, Guseman could not recall ever seeing Heller at the tipple during the strike and I am convinced that Frabutt is in error in the latter respect.

<sup>26</sup> A certain amount of the anticipated increase was earmarked for improvement of benefits which took place in the future, discussed *infra*.

<sup>27</sup> Guseman could not recall Roberson's ever asking him for a raise directly.



April 25, 1977. Roberson made no claim to a standard operator rate. More significantly, Respondent introduced no records to establish that there was any such standard (with or without progression) rate for a plant operator. Indeed, the only such records made available would indicate that, if anything, Roberson had just recently obtained \$6.25 on "1-24-79." In any event, I find that Guseman's assertion that Roberson's increase was one designed to bring him up to a standard plant operator rate is simply not shown to be supported in the record, and that Freeman's testimony on when it was granted is inconsistent.

*c. Petite's response to Freeman's report that employees had learned of earlier raises given*

Petite testified that Freeman, Roberson, and Tennant were granted raises by Guseman without even his awareness until April 10. According to Petite, it was on that day that Freeman approached Petite and told him that the other employees had heard of the raises that Freeman, Roberson, and Tennant had received and wanted to know if they also could get a raise (denied by Freeman); and that Freeman also told him that it had been a while since the employees had last received a raise, that everyone in the Hollow<sup>28</sup> had gotten a raise, and that the rest of the employees were kind of looking forward to it. Petite told Freeman that he did not foresee any problem. According to Petite, he promptly went to the records, determined what the employees were then making, decided the raise to be given to each one, and notified them between April 10 and 12 as he saw them on the property. Petite testified (with corroboration by Guseman) that the granting of wage increases by Guseman was within his authority, and that he did not reprimand Guseman for giving the above three employees a raise earlier. Petite acknowledged that as Respondent's president he would have wanted to know about union authority, and would have been upset if Guseman (and Casino) had known about union activity at the time and had not told him, but asserted that he did not believe that they knew about it. Petite categorically denied that he himself had any knowledge that union cards were being solicited or that a union campaign was going on at Respondent at the time, and otherwise testified that, other than the employees who had been recently granted a raise by Guseman, it had been a year since the employees had received their last raise. In that regard Petite confirmed that Respondent did not have a set rule that it went by, but contended that normally when Respondent's union mines got a pay raise it would raise its non-union operations. Petite related that Respondent had given a raise to the employees at its nonunion mine at the time. Petite asserted that he paid wages to the employees in his nonunion mine that were higher than provided for by the Union's (BCOA) agreement, and, candidly, that he did so, *inter alia*, to keep the Union out. In testifying categorically that he had no inkling that a union organizational campaign was going on at Respond-

<sup>28</sup> In Robins Run Hollow there are apparently three to five independent operations. Petite testified without contradiction that it was common knowledge that March-April was the time for raises, and that in a small mining town news of raises travels fast.

ent, Petite asserted that had he known, "[He] would have increased their wages probably fifteen or twenty percent and [he] would have probably raised the hourly rate a minimum of a dollar and a half to two dollars" and specifically that he would have done so "to prevent the Union from coming in."

Bowman testified that on April 12 Petite came up to him as he was cleaning belt lines. Petite asked Bowman if Dutch Myers (Morris) had been around his house. Bowman replied yes. Petite asked Bowman what he had told Morris. Bowman said that he had told Morris to get to hell out of his house. Petite then told Bowman that the employees would get a raise during the summer if work picked up. According to Bowman, in the same conversation, Petite also told him that he could not afford the Union, that he would just lay all the employees off, and that he would run the place himself, and Petite told Bowman to tell his father to stay away because he thought that was where the union problem was coming from.

According to Petite, he had first found out about the union activity earlier in the afternoon of April 12 through receiving a message from a hospitalized employee delivered to him by an independent trucker.<sup>29</sup> The message was that union organizer Morris had been to Fain's hospital room on several occasions trying to get Fain to unionize. Fain, who had been with the Company for years in different capacities, was apparently last hired on October 2, 1978, and received his first raise in April. Previously the lowest paid employee, as noted, Fain received a \$1.50 raise effective April 18.

Petite testified that he was infuriated, or as he rethought later extremely upset, to learn, only a day or two after giving the employees raises, that they had launched a campaign to unionize Respondent. Petite testified that his first reaction then was for revenge, specifically to fire the employees involved.

Petite related that he had received reports from his employees as much as some 4-5 years earlier that Eddy was union oriented and wanted to organize Respondent's tippie. More recently there was an occasion when Eddy had been escorted off the property in regard to drinking, though without subsequent reprimand. In any event, Petite acknowledged that he felt sure Eddy would be involved in the union organizational campaign up to the hilt, and that number two would be Bowman.

Thus, Petite related that he also knew through rumors that Bowman and his family were for the Union. Petite confirmed that he spoke to Bowman on the afternoon of April 12, and acknowledged that he was at the time trying to pick out the people involved with the Union.<sup>30</sup>

<sup>29</sup> The hospitalized employee, James Fain, allegedly shot during a dispute with his wife, had last worked on Friday, March 23. The trucker did not testify.

<sup>30</sup> Petite also testified, though in another context, that he eats at a local restaurant at which men from the (organized) tug *Donna Lee* also eat; he had been hearing rumors there in March that some of the union men who worked the docks at Consolidated Coal were raising hell because when they needed the tug *Donna Lee* it was down at a scab operation, and had heard that if it did not stop they were going to go over the boat's captain (understood by Petite to be Bowman Sr.) to Consolidated Coal's officials.



Essentially, Petite's testimony as to this conversation either confirmed, or did not effectively dispute, Bowman's account. Thus, Petite related that he told Bowman that he was having some problems with the men, that he wanted to resolve it as best he could, and that he knew Bowman's father had been down there doing Bowman's work, and told Bowman that he did not want any more of it, expressing other stated reasons, all of which I do not find convincing under the circumstances of his earlier inaction.<sup>31</sup>

More materially, Petite, although relating that he did not believe he had asked Bowman if Morris had been to Bowman's home, testified that he believed he did tell Bowman that he had heard a rumor at the time that employees of Consolidated wanted to come down and organize Respondent and, although he did not believe so, he could not say for sure that Morris' name never came up. Petite related that he also told Bowman that Respondent had enough problems without having someone from Consolidated Coal trying to organize Respondent. Although Petite initially asserted that he did not recall a discussion of a further raise with Bowman at that time, thinking he had discussed it with Bowman earlier on April 10, Petite also stated that it was quite possible he had told Bowman that he would get a raise in the summer or when work picked up. Finally, it is observed that, although Petite said he could not remember, he also testified that he was not going to deny that he told Bowman that the Company could not afford the Union, that he would run the place himself, or that he might have to lay somebody off if the Union got in, and testified that, if Bowman was quoting him, it was quite possible that he said it. In view of the above admissions and/or nondenials, I credit Bowman. Accordingly, I find that Respondent, through the acts and conduct of Company President Petite on April 12, has engaged in unlawful interrogation of its employees as to their union activities, sympathies, and desires, has coerced employees with statements of threatened layoff of employees if the Union got in, and has promised future wage increases to employees in order to dissuade them from the Union, all in violation of Section 8(a)(1) of the Act, as alleged in the complaint.

Petite offered in explanation of the \$1.50 increase given to Fain, that he did so because he felt sorry for Fain, who was a hard worker; and Petite also noted that Bowman had previously received a comparable \$1 raise when Bowman was reviewed after his initial hire. How-

ever, this record is also clear by the concession of Petite that, unlike Bowman, a new employee who started low and turned out to be an excellent worker, Fain was an old and intermittent employee who was "in and out of more trouble than 50 people," when last employed, had previously been the lowest paid employee, but had received three times the amount of any raise received by others at the time from Petite's evaluation, and who had (apparently) reported the campaign to Petite. Finally, the amount granted Fain significantly corresponded to what Petite otherwise admitted he would have granted employees had he earlier become aware of the union activity. I am thus wholly convinced that, at least with respect to the amount granted employee Fain, Petite was clearly motivated in part by antiunion considerations, and I find that such grant was clearly in violation of Section 8(a)(1). Nor is the significance of the likely effect of same on Fain's subsequent vote against the Union on April 23 (discussed *infra*) one to be overlooked in that context.

The complaint also alleges that certain interrogations and threats by Freeman in early April (of a date uncertain) were also violative of Section 8(a)(1) of the Act. Respondent essentially defends that Freeman was not a supervisor at the time but a leadman, a defense which I have earlier found nonmeritorious. The Charging Party argues that the questioning and coercive remarks of Freeman to employees are imputable to Respondent based on the determination that he was a supervisor, relying on *Jays Foods, Inc. and Nielsen Brothers Cartage Co., Inc. v. N.L.R.B.*, 573 F.2d 438, 445 (7th Cir. 1978). Therein it was also explicitly held that the possibility that the company may not have known of a supervisor's questioning did not free the company of responsibility for his actions. However, that case did not, as found to be present here, involve a supervisor who had had his own earlier contact and some involvement with the union which was known to the employees (e.g., Bowman and those to whom Bowman had, to a degree, confided). It is initially observed that the Board has not heretofore determined the supervisory status of Freeman, and that I now find that Freeman in fact did occupy such status during material times herein. The Board has previously held that employers must generally accept responsibility for the conduct of foremen having supervisory status. *Glenroy Construction Co., Inc.*, 215 NLRB 866, 867 (1974). I have further found the facts to be that he did interrogate Trippitt as to whether he had signed a card, and that Freeman did coercively tell employees Bowman and Trippitt, probably at the end of their shift about 11 p.m. on April 10, in substance and effect, to forget their interest in the Union because the Petittes would run the business themselves before they would accept the Union as the employees' representative. The only further question raised by the above facts herein found relevant to these complaint allegations would appear to be whether Freeman's earlier involvement in contacts with the Union and/or his understood relationship to employees was such a circumstance as to preclude the required conclusion that his acts in those respects would reasonably tend to restrain and coerce employees. See and compare

<sup>31</sup> Petite otherwise related that he explained to Bowman that they were abusing the relationship by having his dad down there every night placing barges, that it wasn't necessary as for years they had handled barges by power wench, that Bowman was not doing his own work, and that Petite was afraid someone would get hurt on the tug and they would all be in hot water. Bowman responded that his dad was only trying to help them and him out. Petite replied he understood that but that he did not want him down there, that he did not think it was right that his father was down there doing Bowman's work, and that he did not want him down there because an emergency might arise where they needed him and they would not be able to get him. However, the fact is that Petite knew about the situation in March, and that there was local union unrest over it, but Petite did nothing about altering the practice at that time. Even more significantly, on one occasion Petite did relate that the rumor he had heard was that they wanted to come down and organize the plant.

*Montgomery Ward & Company, Incorporated*, 115 NLRB 645, 647 (1956), enfd. 242 F.2d 497 (2d Cir. 1957). It appears that neither the limited extent of Freeman's involved contact with the Union such as has been found herein nor his relationship (or assumed friendliness) with employees constitutes excepting circumstances such that the Board would not hold the Respondent responsible for such antiunion conduct of the said supervisor.<sup>32</sup> I would only further note that the employees herein in fact looked upon Freeman as their foreman. Accordingly, I further conclude and find, that by the above conduct of Freeman, Respondent has additionally violated Section 8(a)(1) of the Act. Cf. *Wolverine World Wide, Inc.*, 243 NLRB 425 (1979); *Daniel Construction Company, a Division of Daniel International Corporation*, 241 NLRB 336 (1979).

The remaining issues in regard to the certain raises granted and made effective on April 4 and April 18 may now be considered. Even without antiunion consideration, a "well timed" benevolent grant of a wage increase to employees in the midst of an employee union organizational campaign constitutes an unlawful employer interference in violation of Section 8(a)(1) of the Act. *N.L.R.B. v. Exchange Parts Company*, 375 U.S. 405, 409 (1964). Whatever pragmatic reservation may arise in the plausibility of attributing specific knowledge to Respondent of the occasion of Bonnett's campaign opening in the form of the personal followup request made of Freeman for a list of employees, there is no such cause for reservation with regard to Superintendent Guseman as to the latter's awareness of the advent of union activity provided by Freeman's more limited general report that a union organizer was then actively contacting Respondent's employees. Guseman did not deny receiving such a report from Freeman, and the same is, I have found, credibly evidenced as occurring (at least) a few days before April 9.<sup>33</sup> To be sure, I am persuaded by the conviction of certain of Petite's testimony, and its plausibility in the light of the weight of the record evidence before me, to conclude that Petite probably did not specifically know at the time he announced raises (beginning on April 10) that certain of his employees had already signed cards for the Union (commencing the day before). However, I have the gravest reservation to full acceptance of his other urging that he was not aware at all of a union campaign at the time, given his own admission that he was aware in March (thus at least by the end of March) that there was local union unrest over Respondent's nonunion operation's use of the unionized tugboat, other timely rumors, and the established awareness not only of Freeman, but even more significantly of Superintendent Guseman, of the specific fact that a union organizer was actively contacting Respondent's employees prior to the announced grant of increases on April 10.

<sup>32</sup> It is to be noted that, in any event, the Board has held, even in instances of warranted exemption from unfair labor practice findings, that the employer is chargeable with knowledge of union activities acquired by such a supervisor, and that the supervisor's statements to employees are admissible as evidence of his employer's motivation in discharging individuals. *Montgomery Ward, supra* at 647.

<sup>33</sup> This finding is based on the credited testimony of Bowman and fair inference therefrom and from Guseman's lack of denial.

Nor in my view has Respondent otherwise advanced cohesive or persuasive explanations for the timing of the announced grant of wage increases to employees at this time. Rather, the strained compatibility of record fact with Respondent's assertions of merely following the policy of a claimed annual raises, and/or one keyed to the timing of area union raises as initially asserted and then substantially defaulted by Frabutt, together with the inconsistencies of past practice evidenced thereon related above and in the record otherwise, the lack of prior awareness of same by employees and supervisors alike, and the incongruity of a claimed initial review of wages by Petite on April 10 as a result of Freeman's report of employee concern over earlier raises unusually granted to but three individuals, under circumstances that participants have either reported divergently or denied, and as compared with the recollection of Frabutt of wage discussions held even a day or two earlier, sufficiently demonstrate, in my view, both reason for rejection and cause to look elsewhere for purpose. In passing, I would only add that even a mere advancement of raise increases (e.g., from May to April) in the above circumstances would be no less unlawful; nor does even the consideration of an announcement of similar (partial) wage increases as much as a week earlier (in April) at the non-union mine warrant a different conclusion, where it is conceded it also was carried out, *inter alia*, to keep the Union out. Accordingly, I conclude and find that, by announcing the wage increases to Respondent's employees on April 10 and at a time when Respondent knew a union organizer was actively contacting its employees, Respondent has interfered with the Section 7 rights of its employees in violation of Section 8(a)(1) of the Act, as alleged in the complaint. *Honolulu Sporting Goods Co., Ltd., a subsidiary of Zale Corporation*, 239 NLRB 1277, 1280 (1979); *Montgomery Ward & Co., Incorporated*, 220 NLRB 373 (1975), enfd. 554 F.2d 996 (10th Cir. 1977).<sup>34</sup>

#### 5. The termination and reemployment of employees Earl Bowman, Willard Eddy, Charles Trippitt, and Richard Heller

##### a. The discharges

Petite did not think he spoke to other employees on April 12 after he had spoken to Bowman, but he did recall discussing the situation further that afternoon with his brother, Jasper Petite, to whom it will be recalled Freeman reported on April 12, *inter alia*, that Bowman had signed a card. At the hearing Respondent made a major admission that it had discharged the four above-named employees for a discriminatory reason. Thus, Petite acknowledged that on the afternoon of April 12 Respondent decided to fire four men, and did so primarily

<sup>34</sup> Having so found and concluded, I further conclude that I need not reach or resolve whether the additionally observed inconsistencies as to the indicated unusual earlier grant of wage increases by Guseman to three employees (though made effective April 4), in the additional light of Guseman's guarded testimony in not recalling the timing of same except in relationship to other employee raises, relating "I'd like to say a couple of weeks, but I'm not too sure about that," is merely to be regarded as rendered suspicious, or has itself risen to the level to warrant still further unfair labor practice findings therein.

because Pettite believed they were union supporters and were where the Union would concentrate its effort.<sup>35</sup> Thus, in addition to the suspected Eddy and Bowman, employees Heller and Trippitt were also selected for discharge.<sup>36</sup> Pettite thereupon typed up individual discharge letters for these four employees, placed them in separate envelopes with the name of the respective employee thereon, and left them in the filing cabinet at the scalehouse. Two of the employees were notified on Friday, April 13. Pettite did not recall if Freeman gave them out (but Freeman did give them to Bowman and Trippitt).

On the following day, April 13 (a Friday), at quitting time, Freeman told Bowman and Trippitt to follow him to the scalehouse. They first went to the supply room, and Freeman then went inside the scaleroom, opened the file cabinet, and withdrew two letters, handing them to Bowman and Trippitt. Bowman's letter, in evidence, reads:

This notice is to inform you that due to poor market conditions there will be a general cutback in personnel and labor force. Termination of your job is to be effective immediately as of 4-13-1979.

Management,  
Jasper Pettite

After Bowman had read his letter, he said to Freeman, "[y]ou know what this was for?" Freeman replied, "I figure, but I don't know for sure." Bowman said it was due to the Union. Freeman said if they needed any references to contact him, and he would give it.

Trippitt confirmed that Freeman called him to the office at 11 p.m. and that he was terminated on a Friday night only 3 or 4 days after he received the last raise. Freeman received the same "general cutback" notice as did Bowman. Although not corroborated, as Bowman could not recall what Trippitt said, Trippitt testified credibly that he told Freeman that "it seems like its kind of silly for us to get a raise 3 days ago and get laid off today." Freeman replied, "I don't know, I talked to them for over an hour, and they still wanted me to give you this letter." Freeman also said that Respondent said he (Freeman) might not even have a job. Trippitt also testi-

fied that there had not been a third shift before, but that one was established after they returned to work on April 23, which shift is still in place, and he otherwise confirmed that Freeman offered that, if Trippitt needed a reference for another job, Trippitt could call Freeman.

Eddy related that he received his termination letter on April 14 (a Saturday) while working on a garden tiller (at a neighbor's home). Guseman drove up and handed Eddy an envelope. Eddy asked what it was. Guseman said, "I guess its your walking papers," requesting Eddy not to hold it against him because he was just doing his job, and then Guseman drove away. Eddy's letter of termination was somewhat different from the basic "general cutback" letter received by Bowman and Trippitt. It provided:

This notice is to inform you that due to poor market conditions, lack of responsibility, unexcusable missing of work, drinking of alcoholic beverages and coming on company property, I feel that you have endangered the safety of our men and therefore must be terminated immediately. Effective 4-13-19.

Management  
Jasper Pettite

Eddy's missing of work (for a previously planned hunting trip) at Thanksgiving and suspension for 3 days has been earlier noted. With regard to the referenced drinking Eddy related that about 1-1/2 months before then he had finished work, gone home, eaten, and had a few beers, and returned to the job. Eddy explained that he had returned to see if Bowman wanted help with a leaking barge. He related that Guseman was there, and had asked him what he was doing there. Eddy told Guseman, who said nothing to him in return. Eddy then spoke to Bowman and left. Guseman confirmed the incident, though he could not recall the details, but significantly testified that he made no recommendation that Eddy be fired. Eddy testified that he otherwise only drank on the premises when others had done so; viz, the superintendent, the foreman, truckdrivers, and other employees. Superintendent Guseman generally confirmed even this; viz, that in the past the supervisors and the employees would break open a case of beer when the shift was over or on the weekend. Otherwise Eddy explained the referenced absences as being occasioned because he also had problems with an apparently work-related back injury at the time while working 6 days a week, and would have to take a day off once in a while. He admitted that Guseman had spoken to him orally, telling Eddy that he wanted to see Eddy there 5 days a week but that he would not thereafter have to work on Saturdays. The asserted additional reasons for the discharge of Eddy, under all the circumstances, were clearly pretextual.

Heller testified that the last day he worked was Friday, April 13, but that it was actually on April 15 (Easter Sunday) that William Harmon (a friend of Heller) came by Heller's home and advised him that Foreman Casino was outside and wanted to see him.

<sup>35</sup> Pettite explained that he had not consulted a lawyer and did not take legality or illegality of the action into consideration at the time, nor consider if there would be any legal repercussions, but decided to fire the four employees and just felt that was the end of it. The Union, in its brief, while acknowledging the same as an exceedingly damaging admission, nonetheless argues that such is not an indication that Pettite is an otherwise credible witness; but that (for asserted reasons) Pettite has admitted only what he could not conceivably deny. In evaluating Pettite's testimony I have taken both arguments into account.

<sup>36</sup> Pettite testified that he felt Heller would also probably be prounion because he was a close friend of Eddy and Eddy would influence him to so be and also because Heller had been "laid off to begin with, just let go" and (he felt) would do anything to hurt Pettite. However, also revealingly, Pettite asserted as a further reason that Heller (had) had access to confidential information and Pettite did not want same to continue. (At the time Heller was working in the yard and had no such access, but later he did when he returned as weighmaster.) Trippitt was suspected by Jasper Pettite because, though a brother-in-law of the latter's son, Trippitt had been recently "reamed out" by Jasper Pettite over an incident involving alleged misleading of the son, and Jasper Pettite concluded that Trippitt would go against Respondent for spite or revenge and probably go union.

Heller went outside. Casino then handed Heller an envelope with Heller's name on it, and he stated that Heller was not to blame Casino, as Casino did not have anything to do with it. Heller inquired what Casino was talking about, and Casino told Heller to open the letter. When Heller did so, he found the same "general cut-back" letter of termination and a final paycheck.

On the basis of the above evidence and the admissions of Petite, I readily conclude and find that Respondent has discriminatorily discharged employees Bowman, Eddy, Trippitt, and Heller in violation of Section 8(a)(3) and (1) of the Act.

*b. The Union's intervening demand for recognition*

Petite confirmed (through Morris and Bonnett) that on April 19 union representatives came to his office and presented him with their demand letter requesting recognition and bargaining. According to Morris, Petite declined to do so, telling them to do what they had to do. Petite's version is that he told them that he did not have anything to say to them at that time, and requested that they leave his office, and that the union representatives immediately told Petite that he would hear from their attorneys.

Petite then took the demand letter to David Frabutt, Respondent's controller, and it was decided that Respondent should contact the local corporate (but apparently nonlabor) counsel, which Petite promptly did. According to Petite, he was told that he did not have to recognize the Union, that he should send the correspondence on and counsel would look into what was to be done, but that the firing of the employees was definitely illegal, and they should be hired back to eliminate his exposure to reinstatement with backpay. Petite asserted that he went out to try to round up the employees to bring them back to work.

*c. The evidenced circumstances of the recalls*

*(1) Trippitt's recall*

It was Petite's understanding that three of the men did not have phones. He instructed Freeman to contact Trippitt (who did have a phone), and Petite intended to contact Heller and Eddy himself but asserts that he could not locate them during the afternoon of April 19. On Thursday, April 19, Freeman contacted Trippitt. Trippitt testified that Freeman asked him if he was ready, or wanted, to come back to work. Trippitt replied, "Yes," but not until the beginning of the next week. Trippitt's version is that Freeman also said that he was talking about (with) a sufficient raise. Trippitt inquired as to what Freeman called a sufficient raise, and Freeman said \$8 an hour. Trippitt asked if Freeman was going to call the rest of the employees. Freeman said that he would as soon as he could contact them, and Freeman then asked if Trippitt could come down that evening and talk to him about it. Trippitt recalled that the Union was not mentioned in the phone conversation, but testified that it was mentioned later that evening by Freeman.

Thus, Trippitt testified that he subsequently met with Freeman about 10 p.m. at the scalehouse, and Freeman

there told Trippitt that the employees would get the \$8 an hour if they would forget about the Union and that there would not be any union there. Trippitt asked again if he was going to call back the other employees. Freeman (again) said that he would as soon as he could contact them. Although led, Trippitt testified that he also asked if they would get their backpay, and Freeman replied, "Yes, next payday." Trippitt promptly pointed out that the next payday was the following day. Freeman then said, "[O]kay, come in tomorrow and I'll have your money at noon." Trippitt returned at noon the following day, April 20 (a Friday). Freeman gave Trippitt his money (in cash).<sup>37</sup> Significantly, Trippitt testified that Freeman at that time told him that there would be a meeting Monday on the hill.

Freeman confirmed that he called Trippitt and Bowman (though I find that Bowman was called later on Monday morning, April 23) after they were fired about coming back to work. At the time he and Roberson were trying to run the operation, and Freeman related that he wanted them back because they knew their jobs. However, Freeman acknowledged that it was Petite who had specifically asked him to call them and to get them to come back to work. Freeman confirmed that he had called Trippitt and had spoken to him at night (and Bowman during the day). He also confirmed that he asked Trippitt (and Bowman) to come back to work and that he had also told them they should forget about the Union, that the Union was a mistake, that they should get back together and be like the family they were before. His version otherwise is that he said, "I'll try to get us a raise, and that they'd get the wages stepped up, that he figured about \$8." However, Freeman asserted that he urged them to forget about the Union and mentioned future raises to them on his own. Of course, at this time not only was Freeman a supervisor as found, but also there would by this time have been no question in the eyes of the employees that he was acting in that capacity for management. Moreover, his offered answers as to why he would have at the time (even) thought he could anticipate receiving still further raises after all the employees had only recently received substantial wage increases were, if not discernibly and revealingly nonresponsive, certainly and clearly not convincing. Far more plausible is that Petite was the source because of his own expressed willingness to combat union interest amongst his employees with the promise of still more substantial wage increases. Accordingly, I conclude and find that Respondent thereby has unlawfully promised employees increased hourly wages to dissuade them from interest in the Union in violation of Section 8(a)(1), as alleged in the complaint.

<sup>37</sup> Petite (obviously upon the report from Freeman) confirmed that Freeman contacted Trippitt, but that Trippitt could not come back to work on the following day, April 20 (a Friday), because of a prior commitment, and also that he was in need of some money. Freeman told Trippitt that Petite was going to bring him back and give him backpay. Petite related that, when Trippitt came by on Friday to pick up his (backpay) check, it was not ready, but that Freeman paid Trippitt out of his pocket, and then reported what he had done to Petite, who then had reimbursed Freeman.

In the early morning of April 20 Harmon again came to Heller's house and told Heller that Foreman Casino wanted to meet with Heller at 8 a.m. down in Maidsville but across the road from the preparation plant on the hill so no one could see them. Heller did as directed and Foreman Casino met him up on the hill. According to Heller's uncontested testimony, Casino on that occasion asked him what he knew about a union, and specifically asked Heller if he had signed a union authorization card. Heller told Casino that he did not know what Casino was talking about. Casino then inquired as to why Heller was mad, and Heller replied that he was mad because he had been fired and because of the way he had been fired, stating that if he had done something wrong he could see it, but that he did not appreciate the way he was fired. In this conversation Heller also told Foreman Casino that he had contacted a couple of attorneys (though he had not as yet) and had spoken to a couple of government officials who were going to take care of the matter for him. With that said Heller left and went home. As Casino did not testify, the testimony of Heller stands uncontradicted. Accordingly, I conclude and find that Respondent has thereby interrogated its employees as to whether they had signed a card and otherwise as to their union activities, interests, and sympathies, all in violation of Section 8(a)(1), as alleged in the complaint.

(2) The Pettite and Heller-Eddy meeting of April 20; alleged threats and promises of benefits

Between 10:30-11 a.m. that same morning, Amelio Pettite (another brother of the Pettites) came to Heller's house, and informed Heller that Pettite wanted to see Heller down at the preparation plant at the scalehouse. Heller inquired, "[H]ow come," and Amelio Pettite replied that he did not know why, but that Pettite had said he wanted to see Heller down there. Heller responded that he knew what it was about, and that it was because of the Union. Amelio Pettite said that he did not know and left.

It was not long thereafter that Eddy arrived at Heller's house. Heller was asking Eddy if he had found a job as Pettite pulled up in the driveway. Heller and Eddy went outside to meet Pettite. Pettite began by saying that he did not know what he was going to do with them.<sup>38</sup> Heller inquired as to what Pettite meant, and Pettite asked if they wanted their jobs back. Heller replied, "[W]e do and we do not." Pettite asked what kind of an answer that was, and Heller responded, "[W]e'll let you know in a couple of days." That was unacceptable to Pettite, who told them, "[I]f you want your job back, you report to work, and if you don't, that's it." Heller told Pettite he did not, that he could not go back under the conditions that they had worked under, and that he was mad over receiving a termination letter rather than Pettite's confronting them. Pettite said that he had written the letter in haste, he knew it was wrong when he did it, he was sorry for doing it, and he wanted them to come back to work. Heller asked if Pettite was going to hire

everyone back, and Pettite said that he was, and, upon inquiry, that he would pay them their backpay. Pettite asked what was so bad about the working conditions down there. Both employees told Pettite that they were tired of being harassed by Foreman Casino. Pettite described in greater detail (which I credit) that as he started back to the truck Heller said to him, "[W]ait just a minute, you know that there is more here than just a job, your problem is a lot more. You would not have had any problems if it wouldn't have been for one boss down there; and you know damn well who I am talking about." Pettite replied that he thought so. Heller said that Casino rode employees too hard and gave them too much hell, that he did not think they had to work under those conditions, that it was not (just) their opinion, that 50-60 percent of the work force felt that way, and that, if Pettite got rid of Casino, everything would probably get back to normal down there. Pettite said that he could resolve that problem immediately (and he subsequently did so).<sup>39</sup> Heller said there were some other points and he mentioned wages and other subjects and Eddy mentioned retirement. Pettite had them wait a minute while he obtained paper and pencil from the truck so he could write the items down, and then they went into Heller's house.

There is conflict over what was said about wages. Heller's version was that he said he did not think they were paid enough, and that it was Pettite who said he would pay them \$8 an hour if they came back to work. According to Pettite, Heller, referring to their conversation earlier in February, stated that he had calculated it and he was looking for \$8 an hour. Pettite replied, "[i]f that's what it is, that's what it is, I told you that I would take care of you when you came back to work." On rebuttal, Heller denied that anything was said to him by Pettite about having earlier promised him a sizable increase, and he testified that they did not discuss his personal rate at all at that time. (Eddy did not remember that part of the conversation.)

All confirmed that Eddy brought up retirement, and Pettite recalled specifically that Eddy said he was looking for some type of retirement, and that he did not want to end up with 20 years down there and an empty bucket. Pettite said he knew that they (Eddy and Heller) had signed cards, and he told Eddy that he could oblige Eddy with a job in the deep mines, which Eddy promptly declined. Heller also suggested that the employees receive vacation pay and paid holidays and that overtime be made optional, and Pettite agreed immediately that overtime could be optional. (Heller testified that the employees theretofore had been receiving an overtime requirement at the last minute.)

Pettite related that the employees also requested that there be mutual respect between employees and bosses. Pettite said he did not see where there was any problem

<sup>38</sup> The following is a composite of the mutually consistent and credited testimony of Heller, Eddy, and Pettite. Where substantial conflicting variances appear they are noted.

<sup>39</sup> Pettite explained that Heller and Eddy did not know it but that was the second or third time that employees (including Freeman) had complained to him about Casino, and that Pettite had already made up his mind to put Casino in another position. The three new job applicants who were hired on April 18, but did not report for work until April 23-24, were put to work on a third shift with Casino (as Pettite related) assigned not as foreman, but as their leadman.

to resolve there, that he did not feel that he had ever had any problem with them. They replied that it was not Petite, and that he knew who they were talking about. They told Petite that he had just a few problems down there, and that they thought the union problem could be resolved if he were willing to meet their demands.

Petite said that he could not afford to have a union down there, because it would break him, and that there was no threat intended, but, if a union did come in down there, the work force would be cut back, and it would probably include both of them. Petite said that he would contact the insurance man and get a pension plan started right away, however, with regard to the requested pay increase, vacation pay, and paid holidays, he could not give that to them unless the Union were voted out, and, as soon as it was, he would give all the employees \$8 an hour, paid vacations, and paid holidays.<sup>40</sup>

There is also some conflict as to who may have initially suggested that Heller act as spokesman for the employees. Heller testified that it was Petite who suggested to Heller that, since he was doing most of the talking, "[W]hy didn't Heller just be the spokesman for the employees." Heller said that he would do so only if the employees could come directly to him with their grievances and if he thought the grievances were menial they then would not need any further discussion with the management or bosses. However, Petite asserts that he did not suggest that Heller act as spokesman, but that Heller, who was doing most of the talking, stated to him that he would act as spokesman. Eddy confirmed Heller that it was Petite who asked Heller if he would be spokesman and Heller agreed. In context either version would appear plausible. The finding that I do make therein is the uncontrovertible one that, at a time when Respondent had received a demand for bargaining from the Union as the exclusive collective-bargaining representative, Respondent recognized employee Heller as the employees' spokesman for discussions on improved wages, hours, and working conditions. Petite told Heller and Eddy to report for work on Monday, and they said that they would.

On the basis of the above findings I readily conclude and find that Respondent has threatened employees with a cutback in operations and layoff if they selected the Union as their collective-bargaining representative, and has promised employees increased hourly wages and improved working conditions and benefits in order to dissuade them from selecting the Union as their collective-bargaining representative and from engaging in activities on behalf of the Union, in violation of Section 8(a)(1) of the Act, as alleged in the complaint.

<sup>40</sup> Although Petite denied that he actually told the men he would grant them what (benefits) he had on the paper, he acknowledged that he did tell them at that time that he did not see any problems with their demands; that he did not think they were outrageous or unreasonable; that they would be taken under consideration and something could be worked out, testifying finally, however, that, though not recalling it, it was quite possible that he told them the above benefits could not be given until the Union was voted out because that was what was in his mind at that time—to get things back to normal without a union. Under these circumstances I credit Heller's further recollection as well (as being the more plausible) that Petite said (essentially) that he would rather split the savings from having no union with the employees and pay them.

### (3) Petite's second visit to Heller's home

Heller related that, on the following Saturday morning, April 21, on returning from the store, he observed Petite in his driveway talking to Mrs. Heller. As he approached, Petite said that he had talked to the insurance man about the retirement program; and that the way it would be set up was that if an employee worked for the Company for 30 years he could retire with \$170,000 to be paid all at one time or so much a year or month. Petite also informed Heller that there was to be a meeting at 3 p.m. on April 23 (a Monday). Petite also inquired of Heller if he would like to have his job back in the scalehouse. According to Heller, he replied that he did and asked what the rate would be (because when fired as highlift operator he had been making \$5.50 per hour), and Petite said that he would let Heller know on Monday and told him to report in on Monday.

Petite confirmed that on Saturday, April 21, he returned to Heller's home, and that Heller was not there when he arrived. Petite spoke to Heller's wife. According to Petite, Mrs. Heller said she would really like for Petite to take Heller back. Petite told Mrs. Heller that they had (already) decided that. Mrs. Heller then said that Heller would like to have his old job back in the scalehouse because it was private, and that their home life had been disrupted by Casino's chewing Heller out, harassing him, or expecting him to do more work. Petite did not recall Heller being there, but added he may have. However, Petite acknowledged that, in either that conversation (with Heller present) or in the conversation with Heller the day before, he told Heller that a meeting had been arranged at the office for insurance purposes, and told Heller what Hawkins, the insurance man, was trying to provide for him, and some of the employees at the mine, explaining that a sum would be taken out of their pay and after 30 years it would amount to \$175,000 and be available in a lump sum or installments, and that they could talk to Hawkins about it. According to Petite, he told Heller how it worked, but that it would be up to him if he wanted to inquire (further) about it. Petite denied that he said who was going to pay for it, or that Respondent intended to set up the plan or pay contributions to it. If not to report on the plan and a meeting Monday on it, it is hard to discern from this record the purpose of Petite's additional visit. Additionally, I would find it also hard to believe that there would have been a discussion with Heller on Friday about his return to his former job as weighmaster without his wife's awareness of that arrangement as indicated by Petite's recollection of her request made of him on that subject that day. I find that Heller's version is more consistent with Petite's admission of Mrs. Heller's having made such an inquiry, and is more plausible, and I credit it. I thus find that Petite's visit that day to Heller's home was to report to spokesman Heller on what he had additionally found out about the retirement plan and to advise Heller that there would be a meeting on it on Monday. I further find that after discussions with Heller's wife Petite offered Heller his former job back as weighmaster. The record has persuasive support for Heller's return as weighmaster at this time; viz, business

had been both backed up and picked up, employees began working more hours, a third shift was added and kept on, and there is an essential admission by Petite otherwise of clear business improvement independently warranting such at the time. However, it should be observed that Petite's willingness thereon came with Heller's indication to Petite of an equal willingness on his part to speak on behalf of the employees without the Union. These circumstances apparently changed.

(4) Petite's seeking additional advice

Charles T. Lazzell has been a neighbor and friend of one of the Petites for some 25 years. Prior to March 1979 he had been employed at a state university (1966-67), and had become president and business manager of a Laborer's Local Union for years representing (1,000-1,500) state employees. However, in March 1979 Lazzell had resigned to go into business for himself as a building contractor. Petite related that his sister knew Lazzell and had suggested that Petite go talk to Lazzell. On Sunday, April 22, Petite and another person drove over to Lazzell's home and spoke to him. They told Lazzell what had taken place.<sup>41</sup> Petite told Lazzell of the discharges, and rehiring, and of the demands made upon him by Heller and Eddy. Petite also told Lazzell that he had fired the four men because of the union organizational campaign, but that he fired Eddy also because Eddy had caused him a lot of problems with drinking and coming on the property. According to Petite, Lazzell suggested that he contact present counsel of record, which Petite did later that evening. Lazzell also went over some things Petite should not do; *viz*, that he should not fire anybody, that he should not get involved in any negotiations (with the employees), and that he should thereafter put everything in writing. Lazzell also expressed a willingness to come down to Petite's office and do what he could to help make sure that Petite's conduct was (thereafter) orderly and that he not do the kinds of things on which charges would be brought.

(5) The events of Monday, April 23

(a) Heller's limited return; Eddy's return delayed

On Monday morning, Heller went to the scalehouse where he had worked before and where Roggish had been working as the weighmaster in the interim. Petite arrived and told Heller that he was to work along with Roggish for a while to observe the bookkeeping (and/or filing) system that Roggish had set up, in the interim as Petite wanted it done that way. Petite also told Heller that he was to tell Eddy when he went in to go back home until 10 a.m. Heller inquired why, and Petite replied that he was thinking about not hiring Eddy back because Eddy had a drinking problem. Heller told Petite that he did not think that Eddy drank any more than the

rest of them, and that was not right if Petite was going to have Heller back not to hire everybody else back. However, Petite did not change the instructions, and, when Eddy arrived, Heller told Eddy what Petite had said. Eddy then left to return at 10 a.m.

After Petite had spoken to Heller he proceeded on through the yard and went up to the office where he met with Lazzell, and Lazzell again went over with Petite some of the things Petite could not do. Lazzell told Petite, *inter alia*, that he should not talk about wages, anything beneficial to the men, or anything harmful to the Union (with examples), but that he should run the business the way he had in the past like the Union never happened. As noted, Lazzell related that, in the first discussion of the terminations Sunday, he told Petite that he should hire everyone back and pay them their back wages. However, in that regard Lazzell also testified that they talked mainly about Eddy's drinking. Lazzell also testified that he told Petite that the matter of Eddy's drinking had not been documented enough to support Eddy's discharge, which suggested that there was a review of the records. (Any such review would more likely have taken place that Monday morning and may have well accounted for the delay until 10 a.m. in the decision to eventually reemploy Eddy.)<sup>42</sup> Eddy returned at 10 a.m. At that time Heller called Petite and notified him that Eddy was back. Petite came down with Lazzell, whom he introduced as his advisor. Petite inquired of Eddy whether he wanted to work the afternoon shift (that day) and Eddy replied affirmatively. Petite then said okay. Heller asked Petite if he had contacted employee Earl Bowman about the 3 p.m. meeting. Petite replied that he could not and did not know how to get ahold of him. With that Heller inquired if Petite would mind if he and Eddy tried to find Bowman and let him know because this was an important meeting. Petite then told Heller that he could not go over the proposals, that he could not make any promises to the employees, and that he could not offer them anything because it would be illegal. He also stated that he could not bargain with them because it would be illegal. Petite testified credibly that Heller became extremely upset about their not talking about the demands. Heller asked if he could talk about it with the other employees, as they were going to be upset. According to Petite, Lazzell said that it was up to Heller, and that the employees were allowed to talk about anything they wanted. Heller then inquired

<sup>41</sup> However, Petite's recollections as to what he told Lazzell about his earlier contact with (corporate) counsel were inconsistent if not in direct conflict. Thus, on direct examination Petite related that he told Lazzell that he was not satisfied with his attorney and was looking for help. On cross-examination he related that he did not tell Lazzell of his contacting his attorney, or the advice received, though acknowledging that he was kind of vague on this subject.

<sup>42</sup> Lazzell variously testified that the purposes for his appearance at Respondent's plant on Monday (and presence off and on except for substantial periods in the next 2 weeks) was to keep Petite from engaging in conduct that would be construed as unlawful activity, and that a priority of his on Monday was to similarly instruct the foremen, and to be available to explain to employees that Petite could not discuss with them at that time any improvements in their wages, hours, and working conditions as they were expecting. Lazzell denied that he participated in an antiunion stratagem, testifying that he had been a longtime business agent who was proemployee, not promanagement, and that he had provided this assistance of explaining the rules to Petite as a friend of the family, for which time and effort he was not paid, though he acknowledged having at the time some current and potential business interests (in coal property leasing) with the Petites. Be that as it may, the record is clear that he did give recommendations on Eddy's return whether on review of just the discharge letter on Sunday or after a further review of Respondent's records on Monday morning.



how it would be if at the meeting he brought up the proposals; Petite could either agree or not, and that would get him off the hook. According to Heller, whom I credit, Petite did not answer, and Lazzell said, "[I]f you bring it up at the meeting we'll give you your answer then."<sup>43</sup>

Heller also appeared to relate that Petite in the same conversation (in Lazzell's presence) inquired of them whether they really wanted the Union in, and that Heller responded that if Respondent had taken better care of the employees in the past no one would have had to worry about a union coming in at that time, but it looked like it was too late for that. Heller's testimony indicated that Petite stated on this same occasion that he was thinking about not hiring Bowman back either because Bowman came from a union family and Petite was afraid his family might influence Bowman's decision about the Union, and that Petite also said that he knew Heller and Eddy had signed cards, that he could not afford to have a union in there, and that if one did come in a lot of people would lose their jobs. Although Heller and Eddy placed these statements in the 10 a.m. conversation with Lazzell present, Petite denied making such statements at that time, and Lazzell also denied ever hearing them said by Petite in his presence. Lazzell did relate that Petite, in telling the employees he could not discuss the wages and benefits with the employees, told them, "I can't talk to you about that now, but if you would have come to me before, we could have talked about it."<sup>44</sup>

Petite testified otherwise that he thought he did tell Heller that he was thinking about not bringing Bowman back because he was from a union family, but was unsure when he did so, though he was sure that it was not after Lazzell had just instructed him as to what he could not do and further believed that it would have been before April 22 (a Sunday). Lazzell testified that one of the reasons he was present was to keep Petite from engaging in such unlawful conversations with employees, and that Petite did not threaten employees in his presence. I am persuaded from Heller's testimony and Petite's essential affirmance that these remarks were made earlier and Eddy's recollection of also being present that they were thus probably made in their earlier conversation held on Friday, April 20. In that connection I observe that a call to Bowman was not made by Freeman until Monday morning.<sup>45</sup> I thus credit Petite and Lazzell that such re-

<sup>43</sup> Lazzell's explanation for same was that he did not know the answer to the question if the employees themselves approached Respondent, and that they had to consult counsel. When they did they found out they could not do that either.

<sup>44</sup> I further credit Lazzell (and Petite) that, in Lazzell's additional discussions with employees in the yard that morning informing them that Petite was unable to discuss wages and benefits with the employees, Respondent followed a restrictive format. I thus further credit Lazzell that, when one or more employees then inquired about employees' getting the union cards back, they were told that was a matter between them and their union.

<sup>45</sup> Bowman thus testified that he next heard from Freeman at 9 a.m. on April 23. Freeman called Bowman and told him that, if he were to forget about the Union, "We could all come back to work, and be one happy family."

marks were not made in the 10 a.m. conversation with Heller and Eddy as they recalled. However, I do find that the remarks as made earlier in the April 20 conversation were additionally violative of Section 8(a)(1) as a further coercive threat of nonrecall for union interest and threats of job loss if employees selected the Union, and I find that they were likely made during the discussion and prior to the amicable understanding in regard to the future wage increase and benefits consideration by the Respondent without the Union, eventually reached that day as shown above.

#### (b) *The meeting at Eddy's house*

Eddy and Heller then left and contacted employees Earl Bowman and Charles Trippitt and arranged a meeting at Eddy's home to go over the proposals.<sup>46</sup> The four employees met and went over what they thought would improve the working conditions and the morale of everyone. The proposals discussed included employees' receiving \$8 an hour with overtime, paid vacations and holidays, a suggestion box, optional overtime, and no harassment from the bosses to the employees or vice versa. Also the four who were fired would be paid backpay. The aforesaid employees then left Eddy's trailer and returned to Respondent's office to attend the meeting scheduled for 3 p.m.

#### (c) *The office meeting*

Heller related that before he got in the door Petite took Heller aside and informed him that he could not even bring up the proposals because Petite had received a letter from the NLRB prohibiting him from bargaining with them in any way, and that he definitely could not grant any proposal that might come from employees. Heller responded that "this [development] isn't going to go over very good with everyone else." Petite responded that his hands were tied and there was nothing he could do, and that it would be illegal if he did anything because of the NLRB letter. Petite confirmed approaching Heller in the hall before the meeting that afternoon, and testified that he told Heller that they had received a letter from the NLRB, that his hands were tied, and that he could not talk about anything to anybody even if he wanted to, that management could not discuss the terms of demands or negotiate, that it was too late for that and that he was not allowed to discuss any of the things that they had talked about at Heller's home. He also testified that Heller said that the guys were going to be upset, and that he would bring it up. Petite handed the NLRB papers to Lazzell in the hallway. They went into the meeting.

In attendance at the meeting held in Respondent's conference room were Petite, Guseman, Lazzell, and almost all of the employees, including Fain, but excluding employee William Elliot, who was absent that day.<sup>47</sup>

<sup>46</sup> Bowman confirmed that he received a call from Heller at or about noon. Heller told him that there was going to be a meeting at 3 p.m. at the office, but that before going there Bowman should meet him at Eddy's house.

<sup>47</sup> The following is a composite of the mutually consistent and credited testimony of Heller, Trippitt, Eddy, Petite, Lazzell, and Freeman.



Petitte started the meeting by telling the employees that he could not talk to the employees because he had received a letter<sup>48</sup> from the NLRB, and introduced Lazzell to them as a man knowledgeable in such matters. With the papers in his hand, Lazzell then told the employees that Respondent had been served by the NLRB, and could not get involved with them in a conversation about benefits. Heller said that he would like to have a meeting with the Company, and he asked that they discuss the money and benefits. Lazzell replied that was impossible, that it was illegal for them to discuss wages, hours, or working conditions, that Respondent could not negotiate or promise them anything, and that it would be like bribery. Lazzell introduced Hawkins saying Hawkins was going to go over the existing insurance plan changes (the dental plan).<sup>49</sup> An employee (probably Eddy) sought to raise an inquiry about the retirement plan, and Lazzell told the employees that Hawkins could not talk to them about a new retirement program, explaining that such would also be considered bargaining, or bribery, but that Hawkins would be going over the existing benefits, and he would answer all their questions in regard to claims and the new dental coverage.

Heller then asked if the employees could have a meeting. Lazzell told them that they could, but that management would have to leave. Heller asked that management leave, and they did, except for Freeman.<sup>50</sup>

Heller had a paper and told the employees what they were supposed to get if they did not join the Union. Heller then read off the proposals that the employees should put to the Company for improved benefits and working conditions. Freeman said that it sounded good, and he then suggested that they have a vote to see who was for or against the proposals by raising hands. All did and it was unanimous. Freeman then went outside and brought in Respondent's secretary, Janice Cyzick (also a notary public), who typed as directed a memorialization that a vote was held on the employees' specific proposals and that it was unanimous.

Freeman then stated that they would have a vote on the Union and if it were in favor of the Union they would make all of these proposals effective that day. However, Heller responded that he was not going to

vote on the Union, and that if an election were held he would vote on the Union at the election. Freeman, however, pressed that they were going to vote on the Union and requested all that were against the Union to raise their hands. Five people raised their hands (including Fain). He then asked all who were for the Union to raise their hands, and no one raised his hand. Freeman then said that if it took all day long they were going to have a vote, and that they were going to vote the Union out. Heller replied, "You're not going to make us vote; there will be a time and place," and he said that even if they did vote it would not be fair anyway because it would not even be a secret ballot. Freeman then suggested that they could write down on a piece of paper either yes or no. However, Heller rejected that also, saying that he was not going to vote. The other three (discriminatees) agreed with Heller. Heller then stated that was the end of their meeting. However, the vote on the Union that transpired was first also memorialized at Freeman's urging. Heller then told the secretary to mark on the paper that four had abstained. The four who abstained were the named 8(a)(3) discriminatees (Bowman, Eddy, Trippitt, and Heller). All present signed this memorialization as well.

I find that by the acts and conduct of Supervisor Freeman, and of Petitte with his awareness, and the support and assistance provided employees in such, Respondent has effectively interrogated and polled employees as to their union sympathies and desires, and has unlawfully in effect promised employees increased hourly wages and other benefits, in order to dissuade the employees from selecting the Union as their collective-bargaining representative, and that it has thereby unlawfully interfered with, restrained, and coerced its employees in regard to their Section 7 rights in violation of Section 8(a)(1), essentially as alleged in the complaint and/or as fully litigated herein.

The insurance meeting with Hawkins followed. After that meeting was over Heller met Petitte in the hallway. Heller brought up the subject of the employees' backpay. It was Heller's understanding that Petitte's promise on the earlier Friday was to give the employees their backpay if the Union were voted out. In any event, Heller brought up to Petitte that Petitte had said that he would give them their backpay. Petitte acknowledged that he had done so. Heller then suggested that, if Petitte wanted to win the employees over to the Company's side, it would probably help to give them backpay since they could not get the proposals. Petitte said okay and asked him to wait a minute while he got Lazzell. Lazzell then said that if Petitte had promised it he could give it. Petitte agreed to do so. Petitte then left, obtained checks for the employees, and handed them out. Petitte's version is that after the latter insurance meeting Heller asked him in the hallway if the four employees could get their backpay. Petitte had told the employees personally and by others that he would reinstate them with backpay. When asked, Petitte said he did not see any reason that he could not do so, and he inquired of Lazzell, who agreed. Petitte then instructed the secretary to make up the checks, but he did not know how they were comput-

<sup>48</sup> The referenced letter was apparently a letter from the Board's Regional Director dated April 20 which had accompanied a copy of the charge filed on April 20 by the Union, charging Respondent with the commission of unfair labor practices in the discriminatory discharges of employees Bowman, Eddy, Heller, and Trippitt on April 13. I do note that the petition was filed on April 20 as well.

<sup>49</sup> There was much evidence presented by the parties on the origin of this meeting with Respondent's urging that the meeting was one which had been set up previously with the insurance agent for the sole purpose of responding to prior questions posed by employees as to their insurance claims service and prior changes made in the existing benefits. However, I find that this meeting had been set up at this time for other purposes as well, including, *inter alia*, a discussion of the proposed new retirement insurance plan, which discussion was at the last moment canceled under the circumstances described above.

<sup>50</sup> In that regard Respondent would have it noted that Freeman's remaining was unquestioned by Heller. It might just as well be observed that Heller, urged by Respondent to be a supervisor, had also remained without a question raised by Respondent. Of course the explanation for this arrangement being satisfactory is readily apparent. Respondent knew what was to be discussed, knew the likely outcome, and approved and supported same.

ed. He confirmed that Trippitt, who had already been paid, endorsed his check back over to Petite. The employees went to work that afternoon, except Heller, who returned to work the following morning. The recorded and signed memorializations of wage and benefit requests, and the vote on the Union, were turned in to Petite and Lazzell and, after review, forwarded to Respondent's attorney. Given the prior discriminatory discharges, I do not find any additional violation of the Act in the award of a sum of money to employees as backpay in the above circumstances.

(d) *The subsequent treatment of Heller and related issues bearing on the allegation of constructive discharge*

On April 24 (a Tuesday) Petite came by the scalehouse in the morning and asked Heller how the employees felt about the Union then especially since he could not give them the proposals. Heller responded that he could not be sure, that he felt they were upset because they had been looking forward to the new benefits. Heller's testimony at the hearing was that it was his best recollection that it was either in this conversation or a later conversation that day that he had asked Petite what his rate of pay would be since he had received his weighmaster's job back. According to Heller, Petite replied that it would be \$8 an hour, \$320 a week, or \$1,280 a month effective April 23. There is no question that Heller received such rate of pay as of April 23. There is a dispute as to when said arrangement was made between Heller and Petite, discussed *infra*.

On the same day, April 24 (I find), Guseman told Heller that Petite had instructed Guseman to tell Heller that he was not to go outside and help around the yard, but was to stay in the scalehouse and just weigh the trucks, though Roggish had remained there also performing weighmaster duties, including handling all the paperwork.

On April 25 (a Wednesday) Petite again came by the scalehouse and asked Heller how he was doing. On this occasion, Heller replied, "[N]ot very good," and Petite asked what was the matter. Heller replied that the thing about the Union had gotten him pretty nervous and he just did not feel good. Petite asked how the employees felt and Heller responded that he did not know; he was not sure. Petite continued, "[D]o you think they'll vote it in or out." Heller again responded that he did not know and he was not sure. Heller then said that he was sick, and he asked to go home. Petite told Heller to wait a moment. Petite went to speak to Lazzell, who was nearby but not in the conversation. They returned to Heller, and Lazzell told Heller, "[Y]ou can go ahead and go home if you feel that bad." Heller said that he would contact them by Friday to let them know how he felt. Though somewhat unclear in the record, either Petite or Lazzell then said, "You're not going to quit are you," and Heller replied, "No, he was not going to quit."

The record herein has been left somewhat choppy (by both parties) as to the days that Heller subsequently worked. It is thus on the basis of such records as were made available and the inherent plausibilities of the credible evidence of record that I have made the follow-

ing findings. Petite sent a letter to Heller dated April 27 which recorded that a grant of time off had been made because of Heller's being physically ill, and, after reciting that Heller was to have contacted Petite by phone but had not done so as of 9:30 a.m. on Friday, April 27, it went on to provide as follows:

Per our conversation Friday morning, April 20, 1979, you requested your previous duties and responsibilities as weighmaster, timekeeper and assistant supervisor of coal movement. At this time I would like to confirm your reinstatement and salary as \$1280 per month which annualizes at \$15,360. In regard to salary, per our conversation, your new salary became effective Monday, April 23, 1979, and your supervisory responsibilities *will* commence on Monday, April 30, 1979. We are holding your job open presently. Please call me not later than 3 p.m. Monday, April 30, 1979, regarding to your return to work. [Emphasis supplied.]

It should be noted, however, that I have found earlier, on the weight of credible evidence, that the subject of Heller's return to the weighmaster job was actually broached by Heller's wife (as reported by Petite) and then raised by Petite and agreed to by Heller and Petite on Saturday, April 21. Heller also credibly testified, I find, that nothing had been said concerning any supervisory duties at all before certain discussions he had later with Petite about the content of the letter in that respect. Not only does the letter reflect a self-serving nature, but I observe in passing, it also reveals on its face an *in futuro* commencement of the asserted "supervisory responsibilities" on Monday, April 30. In that connection Heller testified credibly that he did not go back to work that Friday, April 27, nor on Monday, April 30. However, it is clear that Heller contacted Petite on that Friday afternoon. Heller recalled it as a phone call while Petite indicated there was a visit. Thus, Petite acknowledged that there was an occasion when Heller came to the office and reported that he had been terribly upset and gone to the doctor; that the doctor had told Heller that his nerves and job were getting to him, and that the doctor had told Heller to take 2 weeks off. That Heller did contact Petite in that manner on the afternoon of Friday, April 27, is additionally supported by the circumstance that Petite sent Heller a second letter that day, also dated April 27, which then provided:

Since you have requested 2 weeks off due to irregular health problems, there is no reason why the two weeks of absence without pay cannot be granted. However, we expect you to report to work at 7:00 A.M., Monday, May 14, 1979.

In regard to your illness, Janice Cyzick, Secretary, will answer any questions you might have about sickness and accident benefits.<sup>51</sup>

I am thus persuaded, and I find, that Heller probably visited with Petite on the afternoon of April 27 (a

<sup>51</sup> The new procedure of putting such arrangements made with employees in writing was one initially urged upon Petite by Lazzell.

Friday), some time after consultation with a doctor who had suggested that he take 2 weeks off, and that it was later in the next week, and probably early that week, that Heller called Petite and told him that he was feeling better and would be coming back to work (early). I further note in the latter connection that Heller's recollection (that there was also a discussion with Petite in regard to the reference to "supervisory responsibilities," a matter appearing in the first April 27 letter, and that Petite had told Heller, when Heller questioned him on it, that Heller had the same duties that he had before) is then also wholly compatible with Heller's prior receipt of the letter, whereas a conversation thereon on April 27 would have been less plausible.

Heller testified that he returned to work on May 1 or 2, and I find it was more probably on May 2 (a Wednesday).<sup>52</sup> Petite told Heller that he had a problem with one of the employees; i.e., that Freeman and Guseman had told Petite that Eddy was not doing his job on the day shift—"he was not shoveling the tailpieces down on the river. Petite then told Heller that he could not go to Eddy and reprimand or holler at him because Eddy would just get mad at Petite and probably try to go ahead and vote the Union in. Petite told Heller that he wanted Heller to tell Eddy that he was going to have to do his job better or else Petite was going to have to let him go. Heller agreed to do so. Heller recalled it as being the following day that he told Eddy, as instructed by Petite that he was to shovel tailpieces like everybody else on the afternoon and midnight shift otherwise he would lose his job. Heller testified that Eddy became upset, contending that others were also involved, and asserting that it was not right that he should be getting all the blame. (Heller, of course, would have had no opportunity for observance of Eddy's performance on that job, nor that of others on it.)

Heller also testified that later that same morning (May 2) Petite came by and said that he was mad at them. Heller inquired why. Petite said that every time he had talked to them about the Union or anything like that it seemed like outsiders would find out about it, and he would get into deeper and deeper trouble. Petite told Heller that every time he would ask them if they were talking to anybody other than him about it they would give no comment, and he told Heller that he figured all his talk about trying to make working conditions better was just going to waste because they were running to somebody at night telling them what Petite was telling the employees.

Heller also testified generally that on almost every day he worked Petite continued to ask him what the employees thought about the Union, and if they were going to vote it in or vote it out, and that Petite would also repeatedly tell Heller that he could not afford to have

the Union, and that a lot of them would lose their jobs. Heller testified that Petite's continuing questioning of him about the Union made Heller nervous, and that, when he told that to Petite, Petite replied it (the Union) was upsetting him too.

On the morning of May 3, Heller became sick on the stomach to the point that he had to leave the scalehouse and go to the restroom. On his return to the scalehouse Heller informed Roggish that he was sick, and requested her to notify Petite that he would contact Petite later.<sup>53</sup> On the same day Heller called Petite about noon. Heller told Petite that he wanted to quit. Petite told Heller that he did not want Heller to quit, and asked Heller to come out to the office. Heller agreed to do so that afternoon.

Heller went to Petite's office on May 3 at 2 p.m. Heller told Petite that the biggest thing upsetting him was being questioned about the Union all the time while working. He also complained that he was supposed to have his job back in the scalehouse but that Roggish was still there. Heller told Petite that Petite had told him that as soon as he got back Petite would take Roggish out and put her back in the office, and that Petite had said he wanted Heller to assume all of the duties and responsibilities of the weighmaster job, but Heller could not do so with Roggish still there. Heller also pointed out what Guseman had said Petite had earlier said about Heller's staying in the scalehouse. Heller said that it would be better if Roggish went back to the office. Petite agreed to put Roggish back in the office, and did so the next day. Heller returned to work the next day, Friday, May 4, as sole weighmaster (though only for a time). I note that Petite confirmed Heller's return on May 4.

As noted, Heller actually had returned as weighmaster earlier on April 23 with a salary of \$1,280 (\$640 biweekly) computed at \$8 an hour on the basis of 8 hours a day for 20 days per month (though \$590 is shown on the payroll record as effective April 18) and Petite's letter reflects the effective date of same as April 23. Heller asserted that the agreement on his individual pay rate for the weighmaster job was reached after he had returned to the job, on either April 23 or 24, though his prior statements thereon have not always been consistent therewith. Thus, Respondent established that Heller in the prior affidavit given on August 7 related that the conversation with Petite in which Petite told him he would earn \$320 per week or \$8 an hour with the same duties as before had occurred on April 20, the prior Friday. (The statement with regard to a discussion of the job, but not the rate, would clearly correspond to Petite's letter of April 27.) Though acknowledging that he

<sup>52</sup> This would have constituted about a 1-week absence, and is essentially compatible with the testimony of Lazzell, who, during the 2-week period commencing April 23, was there off and on, but for substantial periods, and who testified that Heller was not there much in that period. In that connection, however, I presently observe that Lazzell's recollections tend to substantiate Heller in that Lazzell recalled it as the late afternoon of April 23, or the next morning, that there were discussions with Petite over whether Heller wanted to come back as weighmaster, and that he told Petite to put it in writing.

<sup>53</sup> In evidence is the following note dated May 3, 1979, and addressed to Roggish:

Nikki

Tell Johnny that I came out to work this morning but that I got sick again. I'll be in touch with him. I guess I came back to work to [sic] soon.

Thanks  
Rich.

had so stated in that affidavit, Heller's testimony at the hearing was nonetheless that it was not April 20, but later, and that he was almost sure that it was April 24. Additionally, in a prior affidavit dated May 8 (closer to the event), Heller had there recorded that Petite had raised his salary to \$1,280 per month on April 23. What is clear from the above is that there had been agreement on a wage increase or wage increases for Heller reached by Petite and Heller at least before Petite's first April 27 letter was issued. Respondent introduced additional evidence in the form of a later statement by Heller, dated May 3, that would have the arrangement made thereon even before the advent of the Union.

Before consideration of this evidence, I would note that Heller admitted that prior to his layoff in February he asked Petite for a raise, and that Petite related that at the time of the layoff he had promised Heller a raise when he returned. However, Heller categorically denied that it was agreed at the time that his pay would be raised to the specific amount of \$1,280 per month upon his return to the weighmaster job. Respondent introduced a handwritten statement dated May 3, addressed to Petite and signed by Heller, which on its face recites the contrary. It provides:

To John Petite Jr.,

This letter is to inform you that I will be satisfied with my old job back as scaleman at the salary of \$1280.00 per month that we agreed on prior to my layoff in February, 1979, at which time when I was layed off the agreement between us was that when production picked up I would be hired back as scaleman at an increase of salary which we had discussed several months ago, when I had asked you for a raise but could not get [one] because production was down.

The intent of this letter is to let you know that I accept my old job back at the increase in salary.

Sincerely,

Richard G. Heller

Heller's explanation was that in their conversation on May 3 Petite had said that he was worried about the pay increase that he had given Heller, and that he might get in trouble over it. Heller otherwise acknowledged that he wanted the money, and that, when Petite asked him if he would write a letter in his own words stating that he had agreed to the raise in February, Heller agreed to do so at that time even though they had not in fact agreed to it in February.

Petite's version was that on that day he had called Heller at home and told Heller that he needed a letter from Heller confirming that Heller was accepting the weighmaster job offered. Petite acknowledged that this was a new procedure which had never been used before, and that it was used pursuant to Lazzell's suggested procedure that everything should be put into writing. Petite's explanation for doing so at this time was because Heller had informed him that he was coming back and Petite wanted confirmation of that fact. With regard to the rate of pay, Petite explained that when he and

Heller discussed the rate, since Petite had earlier told Heller that he would compensate Heller for the time off, Petite did not see any problem in paying Heller that figure, and he asserted that he did not discuss it on April 23 or 24, but acknowledged telling Heller later that he needed written verification. Petite related (with corroboration by Cyzick) that the statement was Heller's voluntary statement thereon and was orally acknowledged before Cyzick as being such by Heller at the time. Finally, according to Petite, the fact of the matter was that Heller was interested in the job and the money, and wanted it confirmed as much as Petite did. I have no doubt on this record that the latter was the case.

It is Heller's testimony that he returned to work on May 4 (a Friday), but that in the next week, beginning on May 7, Petite was back to telling him that he could not afford to have the Union come in, that he was not kidding, that he was not threatening, but that Heller had to understand that Petite could not afford to have a union come in, and, "If it does, you're probably going to lose your jobs." According to Heller, Petite spoke to him that way just about every day that week, and it upset him. (Heller acknowledged that Petite on one such occasion, on May 10 (a Thursday), told Heller that he should not be so upset, and should not let the union campaign get to him.) According to Heller, during the week of May 14, Petite continued to talk to him each day, wanting to know if the employees had changed their minds about the Union and how they were going to vote.<sup>54</sup> Heller testified that he became nervous every time he saw Petite coming.

(e) *The alleged threat to Heller of physical harm or reprisal*

Heller related that on either May 17 or 18 (Thursday, May 17, I find he was in the scalehouse with another individual from Black Rock Test lab taking coal samples. At the time he observed that Petite was out on the scales talking to a couple of other individuals. Heller related that the following incident then occurred.<sup>55</sup> Heller

<sup>54</sup> Respondent also established that in a prior statement of July 26 Heller had stated that he had talked to Petite on May 16 and had not returned until May 17 (a Thursday). However, any suggestion thereby that Heller had not worked in the interim since May 3 is clearly to be rejected. Respondent's witness Roggish recalled that it was 3 weeks to a month before she was called back out of the office to work as the weighmaster. Respondent also (selectively) introduced certain records (reports) which establish that Heller had worked specifically on May 8 (a Tuesday), 11 (a Friday), 16 (a Wednesday), and 17 (a Thursday). In regard to the latter documentation I would note in passing that such reports reflect that Heller not only signed them, as he usually did, but that he also signed his name and showed his hours worked under the caption "Superintendents and Bosses exposure time" along with Guseman. However, the earliest such record produced was that of May 8, and thus no such documentary evidence was offered by Respondent to establish that such reports were filled out by Heller in that fashion prior to May 3. It is well founded in the law that, when weak evidence is offered where strong evidence is available, an inference is warranted that the strong evidence is not offered because it is not supportive of the holder's position. I conclude and find that such is the case here.

<sup>55</sup> Heller's affirmation that Petite had subsequently told Heller not to let the pressure get to him, I find, also occurred on May 17 but after the above incident herein described. Apparently, Heller had not worked on May 14 and 15 of that week, although I note that Respondent has not established such documentarily, but through one of Heller's concessions, which I have found not always supported by the record.

testified that one of the men whom he had seen conversing with Petite came into the scalehouse. The man then locked the door behind him. Heller described the man as being "6-foot tall, 250 pounds, with great big arms and neck." The man walked up to Heller and pointed his finger in Heller's face saying, "What's this I hear about a labor problem down here?" Heller backed into the corner and replied that he did not know what the man was talking about. The man kept shaking his finger in Heller's face saying, "I'm going to tell you something, I do not want to hear no more about a labor problem down here. The Petites do not want a union down here, so I better not hear no more about it." He then pointed to the Black Rock individual and told him that it went for him too. Heller identified the individual as being from another company and not involved. At that point there was a knocking on the door, and, after Petite was let in, Petite inquired what was the matter, telling Heller he looked like he had seen a ghost. Heller told Petite that he did not appreciate what Petite had just had the man do to him. Petite then apologized in front of everyone and said that he was just kidding. Heller responded that it (the apology and the explanation of its being a joke) did not help his nerves, and that he thought the guy was going to put him through the wall. Petite said that he was just razzing Heller a little bit, joking with him and did not mean it seriously. Heller said he still did not appreciate it. Petite again told Heller not to let it get to him, but Heller replied he could not go by what Petite was telling him. On this matter I fully credit Heller.

Petite essentially confirmed the incident, and would explain it as just a joke on Heller, who was then regarded as part of the operation. However, Petite acknowledged that the man was opening up the Jasper mine and compatibly described him as; "This guy's a big burly looking guy, pretty rugged looking." I would only additionally note that Roggish recalled that it was on a Friday (after her 3-4 weeks in the office) that Heller was absent and she was directed to return to the scalehouse, and that she continued to work there thereafter by Petite's direction given the latter and the absence of any record (daily report) produced for Heller as to May 18 (a Friday) I find that Heller was absent that Friday. Heller would return for work one last day, Monday, May 21.

On May 21 (a Monday) Heller went back to work. That morning he observed that the creek by the scalehouse had begun running black. That meant to Heller that the ponds were overflowing. It was Heller's responsibility to have it taken care of immediately. Heller promptly told Superintendent Guseman that the creek was running black and (pursuant to his own instruction from Petite) that Guseman had better get somebody up there to take care of it. Guseman replied that he would take care of it. Heller waited an appropriate length of time but Guseman did nothing about it. When Guseman continued to do nothing about it Heller again told Guseman that he had better go up there, or get somebody to go up there, and take care of it, and that, if Petite came to work and saw it, Heller was going to catch hell. Guseman again replied that he would take care of it. Heller

acknowledged that a few minutes later Guseman did so. However, Heller testified that in the interim he became nervous, began shaking, and got sick again. Heller decided that he was just going to quit. Heller went up to Guseman and told him that he was going to quit, that he could not take it anymore, and told him to tell Petite not to bother sending Harmon or anybody else to his house, because he did not want to see anybody and he had quit. I credit Heller.

Nonetheless, Heller related that shortly after that, Harmon again (after leaving a message for Heller at his home) spoke to him and his wife, telling them that Petite wanted to know why Heller had quit. Heller replied that he had just had it, that there was too much pressure on him, and he could not take it anymore. Heller's wife told Harmon that Petite was picking on him all the time and that it was not right. Heller then said to Harmon, "Tell Petite that it's just too much pressure, I can't take it anymore." Heller also told Harmon that when he had quit earlier he had told Guseman not to send anybody because he did not want to talk to anyone. Heller asked why Petite kept sending Harmon up there. Harmon replied that it was because Petite knew that they were friends and that Harmon could probably talk to Heller better. Heller testified that Harmon on this occasion did not say that Petite had asked Heller to come back, but only to find out what was wrong.

#### 6. Analysis, conclusions, and findings

Petite essentially did not deny the various questionings of Heller as to the union activities and sympathies of the employees. Thus, Petite admitted that, after Heller returned to work as weighmaster, he spoke to Heller on several occasions about the Union, asking Heller if he had heard any of the employees talking about the Union, and probing him as to such matters as whether he felt that the Union had a foothold, whether the employees would be for or against the Union, and whether Respondent would get a favorable reaction or not. While not recalling them individually, Petite did not deny having conversations (pre-May 3) with Heller in which he stated that the Company could not afford the Union or what might happen in regard to jobs if the Union got in; e.g., that Heller would probably lose his job. I credit Heller in all the above respects. Essentially, Respondent's defense is that, when Heller returned as weighmaster, Petite regarded him as management and that Lazzell had told Petite that management could talk to management about unions. Of course, Respondent has been observed not to have been consistent in even that position in its urging that it took pains to have management leave the April 23 meeting in spite of the fact that it left said meeting to be called for and conducted by a contended supervisor. I have found for reasons earlier stated that Heller was not shown to have occupied a supervisory position prior to April 10. The question reserved is whether certain documentation, i.e., the April 27 letter of Petite, the May 3 statement of Heller, and the reports (post-May 8), warrant a different conclusion.

To begin with, as above noted, I have no doubt that Heller wanted both his weighmaster job back and the

new salary increase or increases when specifically offered. However, the content of the May 3 statement of Heller to the extent it would import that there was long prior agreement on a specific salary increase to \$1,280 a month just simply does not comport with the facts otherwise established of record. I conclude and find on the basis of the above evidence that the May 3 documentation was in fact a document generated pursuant to Respondent inspiration and pursued by instruction and direction of Petite; that it was not one founded on fact as revealed by the credible record evidence herein; and that, as such, it is revealed to be, in substance and effect, equally as self-serving in nature as is found to be Petite's April 27 letter on its face. The reports offered by Respondent were equally unconvincing for reasons earlier related. In short, I find the documentation offered by Respondent wholly inadequate to reveal that prior to April 10 or 19 Heller had occupied a supervisory status. Moreover, in all the above circumstances, I find myself wholly unpersuaded by the alternative contention, if raised, that Heller thereafter was effectively constituted and acted as a new supervisor. The credible evidence also clearly reveals that Respondent granted Heller a salary increase in the hourly base amount as he was heretofore unlawfully found to have promised employees. It is also clear that Petite granted Heller a specific wage increase which, considered in the light most favorably to Respondent was at best previously left contingent and indefinite as to the amount months earlier, and is then observed to have been granted to a known and leading employee union adherent at a time when Respondent was itself vigorously urging employees, and that employee in particular, to guide employees into forgetting about the Union. I find that such constituted unlawful interference by Respondent with important Section 7 rights of employees and thus violated Section 8(a)(1) of the Act. Having found that Heller was not a supervisor at the time Petite repeatedly questioned him about the Union, and variously threatened Heller (and others) with job loss if the employees selected a union, it is clear beyond questioning that Respondent has thereby engaged in extensive unlawful interrogation as to employees' union membership, activities, and sympathies, has unlawfully interrogated employees as to the union membership, activities, and sympathies of their fellow employees (including how they felt about the Union and how they were going to vote), and has variously threatened loss of jobs to employees if they selected a union to represent them, all in violation of Section 8(a)(1) of the Act, as alleged in the complaint.<sup>56</sup>

It also follows from the finding that Heller was not a supervisor on or before April 19 that the Union occupied the position of collective-bargaining representative designated by the majority of the employees in the unit heretofore found appropriate.

I have considered Respondent's arguments why a bargaining order should not issue in this case and I find them all without merit under the circumstances set forth

<sup>56</sup> In view of the extensive interference, restraint, and coercion found therein committed by Petite, it is deemed unnecessary to consider any further allegation of such conduct by Freeman, the same, if found, being regarded as but clearly cumulative.

above.<sup>57</sup> The litany of violations found need not be repeated. I further find that by refusing on April 19 the bargaining request the Union which represented a majority of its employees in an appropriate unit, in the light of the unfair labor practices herein found, Respondent has further violated Section 8(a)(5) and (1) of the Act, and that a bargaining order is necessary and appropriate to protect the majority sentiment as found expressed through the valid authorization cards.<sup>58</sup> Moreover, Respondent had a duty to bargain with the Union as of April 10, the date on which the Union had attained a majority and Respondent had set out on its unfair labor practice path to undermine the Union's majority status and make the holding of an election improbable, under applicable principles established by the Board.<sup>59</sup>

There remains but to consider the complaint allegation that Heller was constructively discharged and the related alleged threat of reprisal and physical harm to Heller. The latter was obviously itself seriously violative of Section 8(a)(1) of the Act.

Heller's reaction in quitting on May 21 because of asserted pressure he felt on the job after Guseman's delay in taking the established and prompt action called for on Heller's report of coal pollution of the creek, a plant condition itself involving an established responsibility on Heller, whose performance in regard thereto had been the subject of prior criticism by Petite, is nonetheless not an action to be concluded as having been taken in that factual isolation. Resultingly, the burden of the required showing of intended causation of such a termination by Respondent (the same being then protected as a constructive discharge) is itself not one to be weighed and determined solely in that context; i.e., as an act involving but speculation on Heller's part and/or an instance of unnecessary, and thus unwarranted (unprotected), self-help thereon. The burden otherwise remains of showing that Heller's act of quitting was a reasonably foreseeable reaction to the imposition by Respondent of burdensome and discriminatory work circumstances and conditions. For me to otherwise restrictively view as the cause of this termination the limited circumstances of the creek pollution incident depicted herein would require my ignoring the other surrounding facts of record that this employee was theretofore involved and identified as a leading union adherent by Respondent; that he was the

<sup>57</sup> I would only additionally note as to *N.L.R.B. v. Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978), and similar such cases, that, with all due deference to the view of that court as to other factors properly to be considered by the Board on the issue of a bargaining order issuance, I am bound to apply established Board precedent which has not been reversed by the Supreme Court or the Board. *Fred Jones Manufacturing Company*, 239 NLRB 54 (1978); *Ford Motor Company (Chicago Stamping Plant)*, 230 NLRB 716, 718, fn. 12 (1977).

<sup>58</sup> I specifically conclude and find that the unfair labor practices committed by Respondent were so pervasive and extensive that the possibility of erasing their effects on the employees and ensuring a fair election by the use of traditional remedies is slight. With employees being so conditioned, I find that in this case employee sentiment, as expressed by the authorization cards, is best protected by a bargaining order. *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969); *Staats and Staats, Inc.*, 254 NLRB 888 (1981).

<sup>59</sup> *Trading Port, Inc.*, 219 NLRB 298 (1975); *The Kroeger Company*, 228 NLRB 149 (1977); and *Honolulu Sporting Goods Co., Ltd., a Subsidiary of Zale Corporation*, 239 NLRB 1277, 1283.

clear brunt of a prior unlawful discharge; that he was thereafter brought back with a reward under the auspices of a stated willingness to reject the Union and in a former position held which Respondent viewed as confidential; that he was known by Respondent subsequently to have been unwilling to informally vote the Union out without a Board election; that he was thereafter continuously interrogated (despite a repeatedly demonstrated unwillingness to informally respond); and that he was threatened with personal and other job loss despite an expressed and reported state of nervousness and illness associated with such continuous unlawful Employer conduct by Respondent and was then recently further victimized by an employer-sponsored and orchestrated serious threat of individual physical harm and reprisal if he continued his union advocacy. Nor need I ignore the fact that Heller at the time occupied a position with access to Respondent's supply, production, and shipment data which Respondent has acknowledged it did not want to risk being available to the Union. I find that there is merit in the Charging Party's argument that the entirety of Respondent's course of conduct is revealed thereby as one designed to force Heller out.<sup>60</sup> If the triggering incident of an unusual delay by Guseman and Heller's personal trepidation of likely criticism by Petite stands starkly in relief to the recent prior physical threat temporarily withstood, Heller's understandable point of view that he could no longer believe what his employer was saying in light of what it was doing to him was not ill grounded, and its cumulative effect on the employee has not been overlooked. In short, this is a case situation in which the familiar tort principle that the transgressor must take its victim as it finds him would hold equal sway were it not for the clear showing made that this Respondent also already knew, or had cause to know, the victim's circumstances of anxiety and the disposition to quit. I conclude and find that Respondent by an ongoing course of conduct constructively and discriminatorily discharged Richard G. Heller on May 21 in violation of Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. Maidsville Coal Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The United Mine Workers of America, and United Mine Workers of America, District 31, are labor organizations within the meaning of Section 2(5) of the Act.

3. By unlawfully interrogating employees concerning their union activities, sympathies, and desires, and concerning the union activities, sympathies, and desires of their co-employees; by unlawfully granting wage increases in order to dissuade employees from supporting the Union; by promising employees increased hourly wages, improved working conditions, and other benefits in order to dissuade employees from selecting the Union as their collective-bargaining representative and/or from engaging in activities on behalf of the Union; by threat-

ening employees with discharge, layoff, and cessation or reduction of operations if they selected the Union as their representative and with nonrecall because of union activities; and by utilizing a third party to threaten employees with reprisals or physical harm if the employees continued to engage in activities on behalf of the Union, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

4. By discriminatorily discharging employees Earl F. Bowman, William Kent Eddy, Richard G. Heller, and Charles L. Trippitt on or about April 13, 1979, and by refusing to reinstate them to their former positions of employment until on or about April 23, 1979; and by thereafter discriminatorily causing the termination of and/or constructively discharging employee Richard G. Heller on or about May 21, 1979, and by thereafter refusing to reinstate him, Respondent has engaged in conduct in violation of Section 8(a)(3) and (1) of the Act.

5. All production and maintenance employees employed by Respondent at its Maidsville, West Virginia, facility, excluding office clerical employees and guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times since April 10, 1979, United Mine Workers of America has been duly designated by a majority of the employees in the appropriate unit set forth above, and by virtue of Section 9(a) of the Act has been, and is now, the exclusive collective-bargaining representative of all employees in said unit.

7. By refusing since April 10, and upon demand therefor on or about April 19, to recognize and bargain collectively with the Union, Respondent has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act.

8. Except as found herein Respondent has not engaged in any other unfair labor practices as alleged in the complaints.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent wrongfully discharged Earl F. Bowman, William Kent Eddy, Richard G. Heller, and Charles L. Trippitt on April 13, 1979, and failed and refused to reinstate them until April 23, 1979, and that Respondent thereafter wrongfully caused the termination of and/or constructively discharged employee Richard G. Heller on May 21, 1979, and failed and refused thereafter to reinstate him all in violation of Section 8(a)(3) and (1) of the Act, I find it necessary to order Respondent to offer Richard G. Heller immediate reinstatement to his former job of weighmaster or, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges, and to make whole Earl F. Bowman, Wil-

<sup>60</sup> Cf. *Crystal Princeton Refining Company*, 222 NLRB 1068, 1069-70 (1976); *Boyles Galvanizing Company*, 239 NLRB 530, 540 (1978); *Dodson's Market, Inc. d/b/a Dodson IGA Foodliner*, 194 NLRB 192, 193 (1971).

liam Kent Eddy, Charles L. Trippitt, and Richard G. Heller for any loss of earnings they may have suffered by reason of the unlawful discrimination against them. The backpay provided herein and any interest due thereon shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>61</sup>

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>62</sup>

The Respondent, Maudsville Coal Co., Inc., Maudsville, West Virginia, its officers, agents, successors, and assigns, shall:

##### 1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union activities, sympathies, and desires, and concerning the union activities, sympathies, and desires of their co-employees.

(b) Granting wage increases in order to dissuade employees from supporting the Union and promising employees increased hourly wages, improved working conditions, and other benefits in order to dissuade employees from selecting the Union as their collective-bargaining representative and/or from engaging in activities on behalf of the Union.

(c) Threatening employees with discharge, layoff, and cessation or reduction of operations if they select the Union as their representative, threatening employees with nonrecall because of their union activities, and utilizing a third party to threaten employees with reprisal or physical harm if the employees continue to engage in activities on behalf of the Union.

(d) Discharging or causing the termination of employees because of their membership in and activities on behalf of the Union and/or in order to discourage membership in the Union.

(e) Refusing to recognize and bargain collectively with United Mine Workers of America as the designated exclusive collective-bargaining representative of an appro-

priate unit of all production and maintenance employees employed by Respondent at its Maudsville, West Virginia, facility, excluding office clerical employees and guards, professional employees, and supervisors as defined in the Act.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Richard G. Heller immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and make employees Earl F. Bowman, William Kent Eddy, Charles L. Trippitt, and Richard G. Heller whole in the manner described in the section herein entitled "The Remedy."

(b) Recognize and, upon demand, bargain collectively with United Mine Workers of America as the duly designated exclusive representative of the employees in the appropriate unit described above.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Maudsville, West Virginia, facility copies of the attached notice marked "Appendix."<sup>63</sup> Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 6, in writing, within 20 days of the date of this Order, what steps Respondent has taken to comply herewith.

<sup>61</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>62</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>63</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."